**IN THE SUPREME COURT OF THE**

**STATE OF NEVADA**

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| TITLEMAX OF NEVADA, INC., A NEVADA CORPORATION,<br><br>Appellant,<br><br>vs.<br><br>THE STATE OF NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY, FINANCIAL INSTITUTIONS DIVISION,<br><br>Respondent. | **Supreme Court No.** 69807<br><br>District Court Case No.: A719176 |



# JOINT APPENDIX

**(VOLUME III of III)**
**(JA000387 – JA000553)**

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## INDEX TO JOINT APPENDIX IN CHRONOLOGICAL ORDER

| TAB | EXHIBIT DESCRIPTION | DATE | VOL. | PAGE NOS. |
|---|---|---|---|---|
| 16. | Opposition to Motion to Dismiss for Failure to Exhaust Administrative Remedies | 10/27/15 | II | JA000282 – JA000314 |
| 17. | Order Denying Motion for Preliminary Injunction | 11/02/15 | II | JA000315 – JA000316 |
| 18. | Notice of Entry of Order Denying Motion for Preliminary Injunction | 11/03/15 | II | JA000317 – JA000321 |
| 19. | Opposition to Motion for Summary Judgment | 11/10/15 | II | JA000322 – JA000386 |
| 20. | Reply to Motion to Dismiss for Failure to Exhaust Administrative Remedies | 12/04/15 | III | JA000387 – JA000479 |
| 21. | Reply Memorandum in Support of Motion for Summary Judgment | 12/04/15 | III | JA000480 – JA000489 |
| 22. | Amended Certificate of Service (Reply Memorandum in Support of Motion for Summary Judgment) | 12/08/15 | III | JA000490 – JA000491 |
| 23. | Transcript Re: Nevada Financial Institutions Division's Motion to Dismiss for Failure to Exhaust Administrative Remedies; Plaintiff's Motion for Summary Judgment | 12/09/15 | III | JA000492 – JA000519 |
| 24. | Minute Order on Motion to Dismiss and Motion for Summary Judgment | 12/14/15 | III | JA000520 – JA000521 |
| 25. | Order Granting Motion to Dismiss for Failure to Exhaust Administrative Remedies and Order Denying Motion for Summary Judgment | 02/03/16 | III | JA000522 – JA000523 |
| 26. | Notice of Entry of Order Granting Motion to Dismiss for Failure to Exhaust Administrative Remedies and Order Denying Motion for Summary Judgment | 02/03/16 | III | JA000524 – JA000528 |
| 27. | Notice of Appeal | 02/12/16 | III | JA000529 – JA000538 |
| 28. | Case Appeal Statement | 02/12/16 | III | JA000539 – JA000543 |
| 29. | Notice of Deficiency on Appeal to Nevada Supreme Court | 02/17/16 | III | JA000544 |
| 30. | Notice of Posting Cost Bond on Appeal | 02/22/16 | III | JA000545 – JA000547 |
| 31. | Request for Transcripts | 04/06/16 | III | JA000548 – JA000551 |

| TAB | EXHIBIT DESCRIPTION | DATE | VOL. | PAGE NOS. |
|---|---|---|---|---|
| 32. | Notice of Representation of Defendant | 04/15/16 | III | JA000552 – JA000553 |

# INDEX TO JOINT APPENDIX IN ALPHABETICAL ORDER

| TAB | EXHIBIT DESCRIPTION | DATE | VOL. | PAGE NOS. |
|---|---|---|---|---|
| 9. | Amended Certificate of Service (Motion to Dismiss for Failure to Exhaust Administrative Remedies) | 10/08/15 | I | JA000188 – JA000190 |
| 10. | Amended Certificate of Service (Opposition to Motion for Preliminary Injunction on Order Shortening Time) | 10/08/15 | I | JA000191 – JA000193 |
| 22. | Amended Certificate of Service (Reply Memorandum in Support of Motion for Summary Judgment) | 12/08/15 | III | JA000490 – JA000491 |
| 4. | Amended Complaint | 09/17/15 | I | JA000013 – JA000016 |
| 28. | Case Appeal Statement | 02/12/16 | III | JA000539 – JA000543 |
| 1. | Complaint | 06/01/15 | I | JA000001 – JA000005 |
| 11. | Errata Providing the Complete Exhibit B of Defendant's Opposition to Motion for Preliminary Injunction on Order Shortening Time | 10/08/15 | I | JA000194 – JA000199 |
| 15. | Errata to Plaintiff's Motion for Preliminary Injunction and Motion for Summary Judgment | 10/26/15 | II | JA000254 – JA000281 |
| 2. | Initial Appearance Fee Disclosure (NRS Chapter 19) | 06/01/15 | I | JA000006 |
| 14. | Minute Order on Motion for Preliminary Injunction | 10/14/15 | II | JA000253.1 |
| 24. | Minute Order on Motion to Dismiss and Motion for Summary Judgment | 12/14/15 | III | JA000520 – JA000521 |
| 5. | Motion for Preliminary Injunction | 09/23/15 | I | JA000017 – JA000043 |
| 13. | Motion for Summary Judgment | 10/14/15 | II | JA000231 – JA000253 |
| 7. | Motion to Dismiss for Failure to Exhaust Administrative Remedies | 10/06/15 | I | JA000050 – JA000070 |
| 27. | Notice of Appeal | 02/12/16 | III | JA000529 – JA000538 |
| 29. | Notice of Deficiency on Appeal to Nevada Supreme Court | 02/17/16 | III | JA000544 |
| 18. | Notice of Entry of Order Denying Motion for Preliminary Injunction | 11/03/15 | II | JA000317 – JA000321 |
| 26. | Notice of Entry of Order Granting Motion to Dismiss for Failure to Exhaust Administrative Remedies and Order Denying Motion for Summary Judgment | 02/03/16 | III | JA000524 – JA000528 |
| 30. | Notice of Posting Cost Bond on Appeal | 02/22/16 | III | JA000545 – JA000547 |

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|---|---|---|---|---|
| 32. | Notice of Representation of Defendant | 04/15/16 | III | JA000552 – JA000553 |
| 8. | Opposition to Motion for Preliminary Injunction on Order Shortening Time | 10/06/15 | I | JA000071 – JA000187 |
| 19. | Opposition to Motion for Summary Judgment | 11/10/15 | II | JA000322 – JA000386 |
| 16. | Opposition to Motion to Dismiss for Failure to Exhaust Administrative Remedies | 10/27/15 | II | JA000282 – JA000314 |
| 17. | Order Denying Motion for Preliminary Injunction | 11/02/15 | II | JA000315 – JA000316 |
| 25. | Order Granting Motion to Dismiss for Failure to Exhaust Administrative Remedies and Order Denying Motion for Summary Judgment | 02/03/16 | III | JA000522 – JA000523 |
| 12. | Reply in Support of the Motion for Preliminary Injunction | 10/09/15 | II | JA000200 – JA000230 |
| 21. | Reply Memorandum in Support of Motion for Summary Judgment | 12/04/15 | III | JA000480 – JA000489 |
| 20. | Reply to Motion to Dismiss for Failure to Exhaust Administrative Remedies | 12/04/15 | III | JA000387 – JA000479 |
| 31. | Request for Transcripts | 04/06/16 | III | JA000548 – JA000551 |
| 23. | Transcript Re: Nevada Financial Institutions Division's Motion to Dismiss for Failure to Exhaust Administrative Remedies; Plaintiff's Motion for Summary Judgment | 12/09/15 | III | JA000492 – JA000519 |
| 6. | Summons – Civil (Amended Complaint and Motion for Preliminary Injunction) | 10/05/15 | I | JA000044 – JA000049 |
| 3. | Summons – Civil (Complaint) | 06/11/15 | I | JA000007 – JA000012 |

## CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I electronically filed the forgoing **JOINT APPENDIX (VOLUME III OF III)** with the Clerk of Court for the Supreme Court of Nevada by using the Supreme Court of Nevada's E-filing system on August 2, 2016.

I further certify that all participants in this case are registered with the Supreme Court of Nevada's E-filing system, and that service has been accomplished to the following individuals through the Court's E-filing System:

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

TITLEMAX OF NEVADA, INC., a Nevada corporation,

Plaintiffs,

vs.

STATE OF NEVADA, ex rel. it's DEPARTMENT OF BUSINESS AND INDUSTRY, FINANCIAL INSTITUTIONS DIVISION,

Defendants.

Case No. A-15-719176-C
Dept No. XXI

**NEVADA FINANCIAL INSTITUTIONS DIVISION'S REPLY TO ITS MOTION TO DISMISS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES**

Date of Hearing: December 9, 2015

Time of Hearing: 9:30 a.m.

COMES NOW, Defendant State of Nevada, ex rel. it's Department of Business and Industry, Financial Institutions Division, by and through its attorneys, Adam Paul Laxalt, Attorney General, and David J. Pope, Senior Deputy Attorney General and Christopher Eccles, Deputy Attorney General, and hereby files its Reply to its Motion to Dismiss for Failure to Exhaust Administrative Remedies. This Reply is based on all pleadings and

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papers on file herein, the attached Memorandum of Points and Authorities and any oral arguments the Court may allow at the time of the hearing on this matter.

Respectfully submitted this 4th day of December, 2015.

ADAM PAUL LAXALT
Attorney General

By: /s/ DAVID J. POPE
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## MEMORANDUM OF POINTS AND AUTHORITIES

In its Amended Complaint, TitleMax admits that FID has jurisdiction over the issues raised in this case. In fact, FID has original jurisdiction and this court does not obtain jurisdiction until TitleMax files a petition for judicial review, pursuant to Chapter 233B of the NRS, seeking review of a final administrative decision. NRS 233B.130(6); *see Allstate Insurance Co. v. Thorpe, M.D.*, 123 Nev. 565, 571 170 P.3d 989, 993 (2007) (stating, "whether couched in terms of subject-matter jurisdiction or ripeness, a person generally must exhaust all available administrative remedies before initiating a lawsuit, and failure to do so renders the controversy nonjusticiable. The exhaustion doctrine gives administrative agencies an opportunity to correct mistakes and conserves judicial resources, so its purpose is valuable; requiring exhaustion of administrative remedies often resolves disputes without the need for judicial involvement.").

Exhaustion of administrative remedies is the rule. With the adoption of the Administrative Procedures Act in 1965, aka Chapter 233B of the NRS, the Legislature has stated its intention that the provisions in such chapter "are the exclusive means of judicial review of, or judicial action concerning, a final decision in a contested case involving an agency to which this chapter applies." NRS 233B.130(6) (emphasis added).

TitleMax should not be allowed to strip the administrative process of its fact finding duties. "'The exhaustion doctrine is concerned with the timing of judicial review of administrative action.'" *Nevada Power Co. v. Eighth Judicial District Court*, 120 Nev. 948, 959, 102 P.3d 578, 585 (2004). Judicial review of agency actions should not occur until after there is a final agency decision in a contested case. NRS 233B.130. Contrary to TitleMax's assertions that the administrative hearing is some sort of a reaction to TitleMax commencing this case, TitleMax simply jumped ahead of the administrative proceedings and is seeking declaratory relief and summary judgment to avoid the administrative proceeding and potential administrative fines and voiding of contracts. NRS 604A.820(2)(b); NRS 604A.900; *TitleMax's Opposition to Motion to Dismiss, Exhibit 2.*

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TitleMax is also trying to avoid agency fact finding which will be given deference in a Chapter 233B petition for judicial review proceeding. *See Galloway v. Truesdell*, 83 Nev. 13, 29, 422 P.2d 237 (1967) ("It is well settled that under the division of powers, these ministerial fact-finding duties may not be delegated to courts . . .."); NRS 233B.135(3).

Exhaustion of administrative remedies is not required when it can be shown that initiation of administrative proceedings would be futile.[1] In this case, TitleMax cannot show that exhaustion would be futile because an administrative hearing process is underway and documents are currently being submitted to the Administrative Law Judge and it cannot be said that FID is precluded by statute from providing "any relief at all." *TitleMax's Opposition to Motion to Dismiss, Exhibit 2*; *Benson v. State Engineer*, 358 P.3d 221, 225, 131 Nev.Adv.Op. 78 (2015) (explaining that this exception applies when that facts "prove that the agency is statutorily precluded from granting a party any relief at all . . ." because the statute of limitations within which to initiate such proceedings has passed. (emphasis added). In addition, these issues have never been heard and FID has not obtained a hearing decision regarding the issues. Moreover, the Administrative Law Judge is an objective individual and TitleMax cannot show that the Administrative Law Judge's mind is already made up. In *Benson*, the Nevada Supreme Court concluded, "we do not consider administrative proceedings to be futile solely because the statute prevents the petitioner from receiving his or her ideal remedy through administrative proceedings." 358 P.3d 221, 226 (2015).

Another exception to the exhaustion requirement is applicable when the issues relate solely to the interpretation of the words in a statute or the constitutionality of the

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[1] In *Malecon Tobacco, LLC v. Dept. of Taxation*, 118 Nev. 837, 839, 59 P.3d 474 (2002), the Nevada Supreme Court set forth two exceptions: (1) "when the issues 'relate solely to the interpretation or constitutionality of a statute'"; and, (2) "when resort to administrative remedies would be futile." More recently, in *Benson v. State Engineer*, 358 P.3d 221, 225, 131 Nev.Adv.Op. 78 (2015), the Nevada Supreme Court stated that the exhaustion doctrine is excused "where initiation of administrative proceedings would be futile." Discussing the *Scotsman* case, the *Benson* court noted that, because the three-year statute of limitations had passed, "[t]he statutory procedure offer[ed] Scotsman no relief at all." *Id.* "Thus, when the facts of a particular case prove that the agency is statutorily precluded from granting a party any relief at all, administrative proceedings are futile." *Id.* (citation omitted). That is not the case here.

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statute. *Glusman v. Glusman*, 98 Nev. 412, 419, 651 P.2d 639 (1982) (explaining that the Nevada Supreme Court stated that it had the discretion to not apply the exhaustion doctrine "where the issues relate solely to the interpretation or constitutionality of a statute." (emphasis added)); *State of Nevada, Dept. of Business and Industry, Financial Inst. Div. v. Check City Partnership, LLC*, 337 P.3d 755, 758, n. 5, 130 Nev.Adv.Op. 90 (Nev. 2014) ("Exhaustion is not required where, as here, the only issue is the interpretation of a statute.") (emphasis added). TitleMax has not asserted any constitutional issues. Though TitleMax asserts that the issues are related only to statutory interpretation, TitleMax is seeking a determination that its business practices fit within the statutory limitations which is a mixed question of law and fact. Moreover, these are issues over which FID has original jurisdiction. Consequently, this exception is not applicable and this court should allow the facts to be decided through the administrative proceedings. *Malecon*, 118 Nev. 837, 840-841 (2002); *Galloway*, 83 Nev. 13, 29.

The failure to exhaust administrative remedies deprives this court of jurisdiction and/or renders this case non-justiciable. This court should not review an agency's application of its own statutes before the agency has a chance to obtain a final administrative decision regarding its own interpretation and actions through an administrative proceeding. *See Allstate Insurance Co. v. Thorpe, M.D.*, 123 Nev. 565, 571, 170 P.3d 989, 993 (2007) (stating, "whether couched in terms of subject-matter jurisdiction or ripeness, a person generally must exhaust all available administrative remedies before initiating a lawsuit, and failure to do so renders the controversy nonjusticiable."); *See City of Henderson v. Kilgore*, 122 Nev. 331, 336-337, 131 P.3d 11 (2006) (the Court found that because Kilgore had failed to exhaust his administrative remedies, the matter was not ripe for district court review.); *See Malecon*, 118 Nev. 837, 840-841 (2002) (explaining that fact finding should be done by the agency); *See Galloway*, 83 Nev. 13, 29, 422 P.2d 237 (1967) ("It is well settled that under the division of powers, these ministerial fact-finding duties may not be delegated to court . . ..").

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If TitleMax is given declaratory relief in this case, NRS 604A.820 and the FID's original jurisdiction will be rendered meaningless. Statutory construction principles dictate that such an outcome is to be avoided. *Harris Associates v. Clark County School District*, 119 Nev. 638, 642 (2003); *See Thorpe*, 123 Nev. 565, 571 (2007) (noting, "We have previously stressed the importance of state agencies' exclusive original jurisdiction over legislatively created administrative and regulatory schemes." (citation omitted). Further providing, "'[i]t is not conceivable that the legislature would give its extensive time and attention to study, draft, meet, hear, discuss and pass this important piece of legislation were it not to serve a useful purpose.'" (citation omitted)). The issues regarding who the additional persons are and why they are included as parties to the loans and whether the Grace Period Payment Deferment Agreements violate the statutes include issues of fact and the issues fall within the original jurisdiction of FID.

In Averment #13 in the Amended Complaint, TitleMax states, "Based on the examiner's incorrect application of NAC 604A.230, the FID issued a "Needs Improvement" rating, thereby indicating that TitleMax had demonstrated less than satisfactory compliance in the examination." NAC 604A.230 prohibits TitleMax from "requiring" or "accepting" a guarantor to a transaction. Averment #12 states, "When there is a co-borrower not listed on the title of the vehicle associated with said loan, the co-borrower becomes contractually bound as a principal obligor, and not as a guarantor." Averment #11 states, "The FID examiner concluded erroneously that the co-borrower was a 'guarantor' and that TitleMax was violating NAC 604A.230." FID's examiner applied NAC 604A.230 to the facts as they were seen by the examiner and determined that TitleMax either "required" or "accepted" a guarantor. TitleMax's only explanation is that the additional parties to the loans are co-borrowers. Yet, TitleMax has never stated why a non-owner of the vehicle is included as a party to the loan. These missing facts create issues of fact.

In Averment #19 of the Amended Complaint, TitleMax states, "Based on the examiner's incorrect interpretation of the foregoing statutes, the FID issued a 'Needs

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Improvement' rating thereby indicating that TitleMax had demonstrated less than satisfactory compliance in the examination." The changes made in the Amended Complaint do not change the outcome of this matter. Averment #17 states, "The ROEs [(Reports of Examination)] provided that TitleMax violated NRS 604A.210 and NRS 604A.445 whenever a customer executed a grace period payment deferment agreement . . ...." NRS 604A.210 and NRS 604A.445 prohibit the collection of interest or fees during a grace period and require that such a loan be ratably and fully amortized. In addition, "Grace Period Payments Deferment Agreement," as used by TitleMax, is not a statutory term. NRS 604A.010, et seq. Pursuant to TitleMax's documents, it charges more interest via a Grace Period Payments Deferment Agreement than it charges via the 210 day original loan. *See Opposition to Motion for Summary Judgment, Exhibit C* (Bates No. 011 and 016) (the total amount paid increases from $7,212.73 to $8,748.52 though the principle remains the same amount of $4,420.00). Yet, TitleMax asserts that no additional interest or fees are collected. *Motion for Summary Judgment*, p. 11-13. TitleMax cannot disregard the facts for the purpose of asserting that the issues are purely issues of statutory interpretation. There are issues of fact.

The FID examiner looked at the facts and determined that TitleMax had not complied with NRS 604A.210 and NRS 604A.445. The Grace Period Payments Deferment Agreement is not allowed by statute because it nearly doubles the length of the statutorily allowed 210 day loan, it does not ratably and fully amortize the amount of the loan and it charges additional fees or interest for additional periods therefore there is no grace period. *Opposition to Motion for Summary Judgment, Exhibit C* (Bates No. 016). Though it has been represented that the first seven payments are interest only and the last seven payments are principle only, the Grace Period Payment Deferment Agreement states: "You acknowledge that simple interest is charged on the unpaid principal balance of this Loan Agreement at the daily rate of 0.4663% from the date of this Loan Agreement until the earlier of: (i) the date of your last payment as set forth in the original Payment Schedule; or

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(ii) payment in full. *Opposition to Motion for Summary Judgment, Exhibit C* (Bates No. 17). The agreement also says, "Now that the Payment Schedule has changed . . .." *Id.* The Payment Schedule changes but the Federal Truth-in-Lending Disclosures do not change to inform the customer of the increased finance charge. *Id.* (Bates No. 1). The stated finance charge is $2,792.73 and the amount financed is $4,420.00, for a total to be paid in the amount of $7,212.73. *Id.* When the loan converts to a Grace Period Payments Deferment Agreement, the amount financed, or borrowed, doesn't change but the total of all payments increases to $8,748.52. *Id.* (Bates No. 016). Because interest is charged on the entire principle for each of the first seven months, the finance charge increases by $1,535.79. *Id.* (Bates Nos. 011 and 016). This increase in the finance charge is either additional interest or additional fees and is contrary to NRS 604A.210. TitleMax disagrees with this interpretation of the facts creating a question a fact.

If allowed to avoid an administrative hearing, TitleMax avoids the facts as determined by the examiner and any deference they may be given in accordance with NRS 233B.135 and related case law. *United Exposition Services, Co. v. State Industrial Insurance System*, 109 Nev. 421, 423, 851 P.2d 423, 424 (1993) ("It is well recognized that this court, in reviewing an administrative agency decision, will not substitute its judgment of the evidence for that of the administrative agency." (citation omitted). *Clements v. Airport Authority of Washoe County*, 111 Nev. 717, 722, 896 P.2d 458, 461 ("Although a reviewing court may decide pure legal questions without deference to an agency determination, an agency's conclusions of law which are closely related to the agency's view of the facts are entitled to deference and should not be disturbed if they are supported by substantial evidence.")

**A. Contrary To TitleMax's Assertions, The Division Is Not Forum Shopping By Acting In Accordance With The Legislatively Adopted Administrative Remedies.**

As set forth in the instant motion, FID has original jurisdiction over the issues asserted by TitleMax through this litigation. Because the agency has original jurisdiction,

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these issues will be properly decided through the administrative proceeding that is currently pending before the Administrative Law Judge. Again, the administrative hearing is proceeding pursuant to NRS 604A.820 and in accordance with the regulatory scheme chosen by the Legislature.[2]

Contrary to TitleMax's assertions, the *Malecon*, *NAS*[3] and *Check City* cases actually support the FID's position. *Malecon* sets forth two exceptions to the exhaustion requirement and stresses that fact-finding is to be done through the administrative proceedings. 118 Nev. 837, 839-842, 59 P.3d 474, 476-477. *Malecon* and *Check City* both state that issues of pure statutory interpretation are an exception to the exhaustion requirement, but they merely set forth the exception and the applicability of the exception is determined on a case-by-case basis.

In *Check City*, the issue was "whether NRS 604A.425 unambiguously states that the 25-percent cap includes both the principal amount borrowed and any interest or fees charged." 337 P.3d 755, 756-757, 130 Nev.Adv.Op. 90 (2014). NRS 604A.425 states: "A licensee shall not . . . [m]ake a deferred deposit loan that exceeds 25 percent of the expected gross monthly income of the customer when the loan is made." Analyzing the language of NRS 604A.425 and NRS 604A.050, the Nevada Supreme Court read the statutory scheme as a whole and treated the issue as an issue of pure statutory interpretation. *Id.* at 756-758.

In *Malecon*, the taxpayers were challenging the constitutionality of several statutes as applied to them. 118 Nev. 837, 841. The Nevada Supreme Court determined that the Taxpayers' complaint alleged a factual issue. *Id.* The Court stated, "The constitutionality of the statutes challenged here, as applied, involves a factual evaluation, and this evaluation

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[2] TitleMax refers to the FID's enforcement of the regulatory scheme as an act of arrogance. *Opposition*, p. 8, ln. 25. Case law describes administrative fact finding as ministerial duties. *Galloway v. Truesdell*, 83 Nev. 13, 29, 422 P.2d 237 (1967) ("It is well settled that under the division of powers, these ministerial fact-finding duties may not be delegated to courts . . .."). FID is enforcing statutes adopted by the legislature and, according to the separation of powers doctrine, this is what FID is supposed to do. *Id.*

[3] *State of Nevada, Dept. of Business and Industry, Financial Institutions Div. v. Nevada Assoc. Services, Inc.*, 294 P.3d 1223, 128 Nev.Adv.Op. 34 (2012).

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is best left to the Department of Taxation, which can utilize its specialized skill and knowledge to inquire into the facts of the case." *Id.* Similarly, the FID should be allowed to inquire into the facts of the case at hand before this matter is brought before this court.[4]

In *NAS*, 294 P.3d 1223, 1227-1228 (Nev. 2012) the Nevada Supreme Court determined that FID did not have jurisdiction to issue the advisory opinion or take disciplinary action. That simply is not the case in the instant action. Here, FID has original jurisdiction and has statutory authority to hold the pending hearing to resolve these issues. Considering the *Benson* decision, TitleMax is drawing at straws and has no basis upon which to assert that the *NAS* case renders the FID's position frivolous.[5]

Exceptions to the exhaustion requirement are determined on a case by case basis. In this case, TitleMax inaccurately asserts that the basic facts are undisputed. Because questions of fact exist, these issues are not purely questions of statutory interpretation and the exception to the exhaustion requirement does not apply. In addition, exhaustion of administrative remedies is not futile in this case.

FID is simply acting in accordance with the regulatory scheme set forth in Chapter 604A. Consequently, it cannot be said that FID is forum shopping.

**B. By Ignoring NRS 604A.105 And NRS 604A.115, TitleMax Has Created Questions Of Fact And Therefor This Is Not Purely An Issue Of Statutory Interpretation.**

NRS 604A.105 and NRS 604A.115 state that a customer, or borrower, must prove that they are the legal owner of the vehicle being used to obtain the title loan. The statutory language is clear. During the examination, TitleMax should have been able to show the FID examiner that the additional persons on the loans were also legal owners of the

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[4] The *Malecon* court determined that two administrative remedies existed: "(1) seeking a refund for illegally collected taxes, or (2) seeking an advisory opinion from the Department regarding the constitutionality of the statutes . . .." Similarly, in the case at hand, TitleMax did not request an advisory opinion before taking the actions at issue.

[5] In *Benson*, the Nevada Supreme Court stated, "This court has held that exhaustion is not required when administrative proceedings are "vain and futile" or when the "agency clearly lacks jurisdiction." *Engelmann v. Westergard*, 98 Nev. 348, 353, 647 P.2d 385, 389 (1982)." (emphasis added). 358 P.3d 221, 224 (Nev. 2015). TitleMax cited to the *Engelmann* case in its opposition to the instant motion and yet it still argues that the NAS case supports its position in the case at hand.

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vehicles. Rather than provide such information, or alternatively admit that the additional persons were not legal owners, TitleMax avoids the real issue by arguing that the additional owners are co-borrowers and not guarantors. This actually creates additional questions of fact because TitleMax never provided any explanation as to why the additional person is included on the loan and therefore these facts are missing.

In order to show that these additional persons are statutorily authorized borrowers, TitleMax has to provide additional facts showing that they are legal owners of the vehicles. Similarly, in order to prove that the additional persons are not guarantors, TitleMax has to provide facts showing what purpose these additional persons serve in terms of the lending agreement.

The statutes are too clear for TitleMax to be questioning whether a non-legal owner of a vehicle can obtain a title loan against the vehicle the person doesn't own. The real question is why are these additional people included on the loan? After this question is answered through the administrative proceedings, the clear statutory language can be applied to the facts.[6]

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### C. The Grace Period Payments Deferment Agreement Is Not A Statutory Compliant Product And There Are Questions Of Fact Related To It And Therefor This Case Does Not Involve Pure Issues Of Statutory Interpretation.

The lending product is not a statutorily compliant 210 loan because it charges additional interest or fees in exchange for extending the repayment period. In addition, it

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[6] TitleMax asserts that the following are undisputed facts: (1) that "TitleMax allows a co-borrower to be on a title loan when the co-borrower is not on the title to the vehicle"; and, (2) "TitleMax provides a grace period on 210-day installment loans . . .." *TitleMax's Opposition*, p. 3, pp. 10-15. Because there is no explanation as to why the additional persons are included on the lending product and no proof that they are legal owners, it cannot be determined, let alone agreed, that the additional persons are co-borrowers. If these additional persons are not legal owners, they are not statutorily authorized customers/borrowers and therefore should not be on the loan. NRS 604A.105; NRS 604A.115. In addition, "co-borrower" is not a term defined in Chapter 604A. Furthermore, no definition of the term was found in Black's Law Dictionary (6th Ed. 1990). "Borrower" is defined as "[h]e to whom a thing or money is lent at his request." Black's Law Dictionary, 185 (6th Ed. 1990). Because the statutes prohibit lending to someone who doesn't own the vehicle, a non-owner cannot be a borrower and therefore cannot be a co-borrower. NRS 604A.105; NRS 604A.115. In addition, no grace period is being provided and additional interest and/or fees are being charged. Moreover, the Grace Period Payments Deferment Agreements are not statutorily compliant 210 day loans. Therefore, these are not undisputed facts and TitleMax is merely making unsupported assertions in the hope of obtaining an advisory opinion from this court. So, we are not applying undisputed facts to the clear statutory language and TitleMax erroneously relies on the cases cited on page 3 of its opposition.

does not provide for a grace period even though its name attempts to indicate that it does. As a result, the facts are not undisputed, as asserted by TitleMax. Because there are questions of fact, the exception to the exhaustion requirement for pure issues of statutory interpretation does not apply. *See Malecon*, 118 Nev. 837, 841 (2006) (the Court determined that the complaint alleged a factual issue); *See Check City*, 337 P.3d 755, 758, n. 5, 130 Nev.Adv.Op. 90 (Nev. 2014) ("Exhaustion is not required where, as here, the only issue is the interpretation of a statute.").

**1. <u>There is no grace period.</u>**

TitleMax asserts that there is a grace period. As argued by FID in its Opposition to the Motion for Summary Judgment, there is no grace period offered by the Grace Period Payments Deferment agreement.

Pursuant to NRS 604A.070, the term "grace period" is defined as "any period of deferment offered gratuitously by a licensee to a customer if the licensee complies with the provisions of NRS 604A.210." "Deferment" is defined as "A postponement or extension to a later time . . .." Black's Law Dictionary, 421 (6th Ed. 1990). "Defer" is defined as "[d]elay; put off; . . . postpone to a future time." *Id.* Because the Grace Period Payments Deferment Agreements charge interest on the entire original outstanding principle for the first seven periods and a payment is due in every period of the extended payment schedule, there is no deferment. *Id.* In addition, "gratuitous" is defined as "[g]iven or received without cost or obligation: FREE." Webster's II New College Dictionary, 487 (1999). Because TitleMax charges more interest through the Grace Period Payments Deferment Agreement than through the original 210 day loan, the extended repayment schedule offered through the Grace Period Payments Deferment Agreement is not obtained for free and there is no grace period. *Id.*

The term "grace period" is defined as "[a] period of extra time allowed for taking some required action (such as making payment) without incurring the usual penalty for being late." Black's Law Dictionary, 705 (7th Ed. 1999). The term is defined elsewhere as

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"[t]he amount of time after a payment due date when no interest is charged." *See* Fn. 6, *infra*. Based on what is known at this time, there is no grace period experienced when an original 210 day loan is amended to become a Grace Periods Payment Deferment Agreement. *Id*.

The statutory language of NRS 604A.070 is plain and unambiguous. Because TitleMax is arguing that there is a grace period, there must be unknown facts which create issues of fact that must be determined through the pending administrative proceeding. *Malecon,* 118 Nev. 837, 841 (2002) (providing, "this evaluation [of facts] is best left to the [agency], which can utilize its specialized skill and knowledge to inquire into the facts of the case."); *Galloway v. Truesdell*, 83 Nev. 13, 29, 422 P.2d 237 (1967).

Therefore, TitleMax cannot say that it's undisputed that there is a grace period and that there are no factual issues. The factual determinations should be made through the pending administrative proceeding. *Malecon*, 118 Nev. 837, 841 (2002); *Galloway v. Truesdell*, 83 Nev. 13, 29, 422 P.2d 237 (1967).

**2. <u>TitleMax charges additional interest.</u>**

TitleMax asserts that it doesn't charge additional interest. As argued by FID in its Opposition to the Motion for Summary Judgment, any interest charged in excess of that which could have been charged during the original 210 day loan is additional interest charged in violation of NRS 604A.210.[7]

NRS 604A.210 states that grace periods can be given provided no fee is charged and no additional fees or interest are charged on the outstanding loan. Reading the statutory scheme as a whole, a licensee can charge 210 days of interest. NRS 604A.445(3); NRS 604A.210. Because TitleMax charges more interest through the Grace Period Payments Deferment Agreements than it could during the original 210 loan,

[7] In the sample original 210 day loan contained in FID's *Opposition to Motion for Summary Judgment*, *Exhibit C (Bates No. 011)*, the total amount of the loan is $7,212.73, the principle is $4,420.00 and the total interest that can be charged is $2,792.73. *Id.* After the loan is amended and morphed into the Grace Period Payments Deferment Agreement, the total amount of the loan increases to $8,748.52 while the amount of the principle remains $4,420.00 which means that the interest increases from $2,792.73 to $4,328.52. *Id.*

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TitleMax is charging additional interest or fees on the outstanding principle. Interest is not charged during grace periods.[8] Because no interest accrues during a grace period, the only interest that can be charged is the statutorily allowed 210 days of interest. Any other interest or fees charged constitute additional interest or fees charged in violation of NRS 604A.230. Charging interest during a grace period extends the loan in violation of NRS 604A.445(3)(c). The facts presented to this court to show that additional interest or fees are being charged were not presented by TitleMax in the same way as they have been presented by FID. TitleMax's assertions have glossed over the factual disputes. If TitleMax actually agreed with the facts as seen by the FID, TitleMax would have to agree with the FID that additional interest is being charged. But, TitleMax doesn't agree that additional interest is being charged. Moreover, the different views of the facts have not been presented to the Administrative Law Judge and findings of fact have not been made. This fact-finding should be done through the administrative proceedings without involvement of the courts. *Malecon*, 118 Nev. 837, 840-841 (2002); *Galloway v. Truesdell*, 83 Nev. 13, 29, 422 P.2d 237 (1967) ("It is well settled that under the division of powers, these ministerial fact-finding duties may not be delegated to courts . . .").

Therefore, TitleMax cannot say that it's undisputed that no additional interest or fees are charged or that there are no factual disputes.

**D. <u>TitleMax Has An Adequate Remedy.</u>**

In this case, the administrative hearing is proceeding pursuant to NRS 604A.820. The subject matter of such hearing is the violations discovered during the examination. As asserted in the Affidavit in *Exhibit C* attached to the instant motion to dismiss, the FID completes the examination report, provides a copy to the licensee and thereafter the licensee has the option of complying with the statutes or stating that it won't comply.

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[8] "Grace Period" is "[t]he amount of time after a payment due date when no interest is charged." https://www.lendingtree.com/glossary/what-is-grace-period. Also defined as "[t]he number of days between a consumer's credit card statement date and payment due date when interest does not accrue." http://www.investopedia.com/terms/grace-period-credit.asp.

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*Exhibits A and C.* If the licensee decides not to comply, they'll either receive an NRS 604A.820 hearing or an NRS 604A.810 hearing.

TitleMax unconvincingly argues that there is no remedy by arguing that there is no statutory authority for a licensee to challenge a report of examination. When licensees fall out of compliance, or challenge the FID's interpretations, the administrative remedies are set forth in Chapter 604A of the NRS and a licensee's violations noted in an exam report can be presented in an administrative hearing.

Moreover, administrative hearings proceed in accordance with Chapter 233B of the NRS. Licensees are afforded notice and an opportunity for a hearing. NRS 233B.121. The parties have the ability to present evidence and examine witnesses. NRS 233B.123. Upon being aggrieved by a final written decision, licensees can file a petition for judicial review pursuant to NRS 233B.130.

These statutory remedies are not made up. Moreover, they are adequate remedies and should not be bypassed on the baseless claims of TitleMax that it had no other option but to seek declaratory relief. *TitleMax's Opposition*, p. 8. Ln. 12-14.[9]

**E. <u>Titlemax Has Failed To State A Claim Upon Which Relief Can Be Granted.</u>**

For all the reasons stated, this court does not have jurisdiction and the case is not justiciable and/or is not ripe. A purpose of the exhaustion requirement is to potentially take care of contested cases without the need for court involvement or resources and to otherwise obtain a final agency decision rendering the matter a justiciable case in controversy. *Thorpe,* 123 Nev. 565, 571 (2007). Until there is a final agency decision, this court cannot hear this matter and it must be dismissed. *Id.*; *See Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986) (stating, "the issue involved in the controversy must be ripe for judicial review.").

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[9] TitleMax seems to disrespectfully assert that this court would be "foisting" the Legislatively approved statutory hearing as an adequate remedy. *TitleMax's Opposition*, p. 8, ln. 15. TitleMax subjects itself to the administrative remedy when it takes action before, and/or without, seeking advice from the FID and deciding not to comply with the FID's advice after FID discovers the violations, provides notice of the violations and gives direction as to how to comply through the exam process.

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TitleMax has not been aggrieved by a final agency decision. NRS 233B.130 states that a party to an administrative proceeding who is aggrieved by a final agency decision can file a petition for judicial review seeking the courts review of the final decision. Because TitleMax has not yet been aggrieved by a final agency decision, this matter is not ripe for review.[10] Because it's not ripe and/or the court lacks jurisdiction, there is no merit to TitleMax's claims and no claim upon which relief can be granted has been stated or can be stated.

Moreover, similar motions to dismiss for failure to exhaust administrative remedies based on NRCP 12(b)(5) were filed in *Harrah's Operating Co., Inc. v. State, Dept. of Taxation*, 321 P.3d 850, 2014 WL 1096723 (2014) and *Sierra Pacific Power Co., et al. v. Dept. of Taxation, et al.*, 338 P.3d 1244 (Nev. 2014). *See Exhibit D.*[11] The motions were never rendered ineffective for the reason that they were brought pursuant to NRCP 12(b)(5).

TitleMax argues that Nevada is a notice pleading state, and it is. Though the instant motion is not a pleading, it has provided plenty of notice regarding the issues. NRCP 7.

TitleMax was made well aware of the issue, *i.e.* failure to exhaust administrative remedies, and responded. More recent case law indicates that failure to exhaust is an issue of non-justiciability. *See Thorpe*, 123 Nev. 565, 571, 170 P.3d 989 (2009) (stating, "whether couched in terms of subject matter jurisdiction or ripeness, a person generally must exhaust all available administrative remedies before initiating a law suit, and failure to do renders the controversy nonjusticiable."); *See City of Henderson v. Kilgore*, 122 Nev. 331, 336-337, 131 P.3d 11 (2006) (the Court found that because Kilgore had failed to exhaust administrative remedies, the matter was not ripe for district court review). Based on case law, FID could have asserted NRCP 12(b)(5) and/or NRCP 12(b)(1). Nonetheless,

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[10] *Thorpe,* 123 Nev. 565, 571, 170 P.3d 989 (2007).

[11] Though the cited cases are published, the related writ petition cases were not published. The Department is not attempting to cite to matters in violation of SCR 123, but offers the motions to dismiss as either relevant to each of the cited cases as "law of the case," respectively, which is an exception stated within SCR 123, and/or as persuasive examples of similar motions brought pursuant to NRCP 12(b)(5).

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because the issues are not ripe, TitleMax cannot state a claim upon which relief can be granted. Consequently, this court can and should dismiss this case.[12]

**F. <u>The Futility Exception Does Not Apply.</u>**

In support of its argument that the futility exception applies, TitleMax cites to *State v. Scotsman Mfg. Co.*, 109 Nev. 252, 255, 849 P.2d 317, 319 (1993), *Malecon*, 118 Nev. 837, 839 and *Engelman v. Westergard*,[13] 98 Nev. 348, 647 P.2d 385 (1982).[14] In *Scotsman*, the Nevada Supreme Court determined that it would have been futile to require Scotsman to submit administrative refund requests because the time for doing so had already passed and the Nevada Supreme Court had already determined that the sales tax assessment was unconstitutional and granted a refund. 109 Nev. 252, 253. Moreover, the *Scotsman* court also determined that barring the refund would have been contrary to the United States Supreme Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 31, 110 S.Ct. 2238, 2247 (1990). No such facts exist in this case.[15] The *Scotsman* court stated, "The statutory procedure offers Scotsman <u>no relief at all</u> given the three-year period of limitations invoked by the state" because the refund claims would have been time barred. *Scotsman*, 109 Nev. 252, 255 (1993) (citation omitted).

TitleMax cited to *Malecon* to cite to *Karches v. City of Cincinnati*, 526 N.E.2d 1350, 1355-56 (Ohio 1988), which is not a Nevada case, for the purpose of arguing that exhaustion is not required when "administrative remedies would be futile or unusually onerous." *TitleMax's Opposition*, p. 9, ln. 5. The pending administrative hearing is not "onerous or unusually expensive" as compared to what the Karches went through. 526 N.E.2d 1350, 1355-57. To the extent the *Karches* decision indicates that exhaustion is not required when there is no administrative remedy available which can provide the relief

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[12] FID cited to NRCP 12(b) generally and specifically mentioned NRCP 12(b)(5). Even if its determined that FID should have cited NRCP 12(b)(1), "[i]f a judgment or order of a trial court reaches the right result, although it is based on an incorrect ground, the judgment or order will be affirmed on appeal." *D. Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (citation omitted).

[13] The Nevada Supreme Court found that the administrative remedy was no longer viable because the 30 day period for seeking an extension had expired two years earlier. 98 Nev. 348, 353.

[14] The rest of the cases cited to by TitleMax on this issue are non-Nevada cases.

[15] Unlike Scottsman, TitleMax has not complied with the law under protest. 109 Nev. 252, 255 (1993).

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sought, the Nevada Supreme Court stated, in the *Benson* case, that the futility exception does not apply just because the available remedy isn't the desired remedy. *Benson*, 358 P.3d 221, 226 (Nev. 2015). Moreover, the pending administrative hearing can provide the relief sought and the final decision can be reviewed by the district court. NRS 233B.135.

In this case, TitleMax merely jumped ahead of the administrative proceedings. In *Benson v. State Engineer*, 2015 WL 5657106, 4, 131 Nev.Adv.Op. 78 (2015), the Nevada Supreme Court stated that initiating administrative proceedings would have been futile because the time for requesting such a hearing had long since passed. That is not the case here. The administrative hearing is currently pending before an Administrative Law Judge and the parties have been submitting documents in accordance with a scheduling order. *Exhibit E*.

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The rest of the cases cited to by TitleMax on this issue are not Nevada cases. The most recent Nevada precedent is the *Benson* case, which explains that the futility exception is applicable when the time limits for pursuing the administrative remedy have expired. 2015 WL 5657106, 4 (2015). This exception applies when the facts "prove that the agency is statutorily precluded from granting a party *any relief at all* . . .." *Id.* (citation omitted). The Benson court also stated, "we do not consider administrative proceedings to be futile solely because the statute prevents the petitioner from receiving his or her ideal remedy through administrative proceedings." *Id.* at 5.

If it is "futile logic" to obtain an administrative decision from an administrative law judge as asserted by TitleMax, then no administrative proceedings would occur as similarly situated licensees challenging agency interpretations through administrative proceedings are the norm. Any such conclusion would render all similar regulatory schemes meaningless. *Harris Associates v. Clark County School Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003) (stating, "no part of a statute should be rendered meaningless and its language 'should not be read to produce absurd or unreasonable results.'").

In addition, though the parties have taken their respective positions, these issues have not been heard through an administrative proceeding and there is no prior administrative decision to point to for the purpose of saying there is a definite outcome. Even if a prior administrative decision regarding similar issues existed, administrative decisions are not stare decisis and are not binding precedent. *Motor Cargo v. Public Service Com'n of Nevada*, 108 Nev. 335, 337, 830 P.2d 1328, 1330 (1992). Moreover, the administrative proceeding is pending before an Administrative Law Judge, not the FID. *Exhibit E*. The administrative hearing is not extraordinarily burdensome and there is no definite outcome. *Cf. Karches v. City of Cincinnati*, 38 Ohio St.3d 12, 526 N.E. 2d 1350, 1352 (1988) (explaining that Plaintiffs learned of the zoning change approximately 3 years after it occurred and they consulted an attorney and discovered that the statute of limitations for administratively appealing the zoning change had expired. In addition, the court concluded that there was no remedy that could provide the Karches with any relief. Whereas, in the case at hand, an administrative hearing followed by judicial review can provide TitleMax with the relief it seeks provided such relief is in line with the law.).

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**G. <u>This Court Can Also Apply The Primary Jurisdiction Doctrine.</u>**

This court can also defer action on these issues to FID by application of the primary jurisdiction doctrine.

> As we explained in *Sports Form v. Leroy's Horse & Sports*, the "doctrine of primary jurisdiction requires that courts should sometimes refrain from exercising jurisdiction so that technical issues can first be determined by an administrative agency." The doctrine is premised on two policies: "'(1) the desire for uniformity of regulation and, (2) the need for an initial consideration by a tribunal with specialized knowledge.'" Thus, "[i]n every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." Application of the doctrine is discretionary with the court.

*Nevada Power Co. v. Eighth Judicial District Court*, 120 Nev. 948, 962 (2004) (concluding that "the district court could have deferred action under the primary jurisdiction doctrine for

the PUC to address one issue implicated in the amended complaint . . ..). In the case at hand, there are technical issues to be determined through the administrative proceedings. In addition, there is a desire for uniformity in regulation and there is a need for the specialized knowledge of FID to be utilized via the administrative proceedings. The reasons for the existence of the doctrine are present in this case and the purpose it serves will be aided by its application.

## CONCLUSION

Based on the foregoing, the Department respectfully requests that this Honorable Court Order the following:

1. The Plaintiff's claims are dismissed;

2. The administrative hearing shall proceed; and,

3. Any other relief this court deems appropriate.

Respectfully submitted this 4th day of December, 2015.

ADAM PAUL LAXALT
Attorney General

By: /s/ DAVID J. POPE
David J. Pope
Senior Deputy Attorney General
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## CERTIFICATE OF SERVICE

( **X** ) I hereby certify that I electronically filed the foregoing **NEVADA FINANCIAL INSTITUTIONS DIVISION'S REPLY TO ITS MOTION TO DISMISS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES,** along with Exhibits D – E, with the Clerk of the Court by using the electronic filing system on the 4th day of December, 2015.

The following participants in this case are registered electronic filing systems users and will be served electronically:

Patrick Reilly, Esq.
Nicole Lovelock, Esq.
Holland & Hart
9555 Hillwood Dr., 2nd Floor
Las Vegas, NV 89134

( )

I certify that some of the participants in the case are not registered electronic filing system users and I have mailed the foregoing documents by First-Class Mail, postage prepaid to:

( )

I certify that I have served the foregoing documents by First-Class Mail, postage prepaid and by e-mailing same to participant's personal e-mail address as follows:

/s/ Debra Turman
An employee of the Office of the Attorney General

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# Exhibit D

MOT
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*DISTRICT COURT*
**CLARK COUNTY NEVADA**

HARRAH'S OPERATING COMPANY, INC.,

Plaintiff,

vs.

STATE OF NEVADA, ex rel. DEPARTMENT OF TAXATION,

Defendant.

**Case No. A09603967-C**
**Dept. No. I**

**MOTION TO DISMISS**

**Date of Hearing: 03/02/10**
**Time of Hearing: 09:00 am**



COMES NOW, Defendant State of Nevada, ex rel. Department of Taxation (hereinafter "Department"), by and through its attorneys, Catherine Cortez Masto, Attorney General, and David J. Pope, Senior Deputy Attorney General, and hereby moves this Court for an Order dismissing the Complaint. This Motion is filed pursuant to NRCP Rule 12(b)(5) and is also based on all pleadings and papers on file, the attached

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Memorandum of Points and Authorities and any oral arguments the Court may allow at the time of the hearing on this matter.

Respectfully submitted:

Dated January 22nd, 2010

CATHERINE CORTEZ MASTO
Attorney General

By: _____
DAVID J. POPE
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**NOTICE OF MOTION**

PLEASE TAKE NOTICE that the foregoing Motion to Dismiss will be heard before the above-entitled Court on the 2nd day of March, 2010 at 09:00 a.m. in Department I or as soon thereafter as counsel may be heard.

Dated January 22nd, 2010

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## I. MEMORANDUM OF POINTS AND AUTHORITIES

## FACTS AND PROCEDURAL HISTORY

Plaintiff, Harrah's Operating Company, Inc. (hereinafter "Harrah's") purchased four aircraft and remitted use tax to Defendant, the Department of Taxation (hereinafter "Department") related to the purchase of each aircraft. Complaint, para. 3 through 5 attached hereto as Exhibit 1. The Department administers and collects Nevada's sales and use tax. Claims for refund were filed with the Department on behalf of Harrah's. Id. at para. 6 through 7. The Department denied the requests for refunds and Harrah's filed Petitions for Redetermination. Id. The matters regarding the requests for refunds were then submitted on stipulated facts to an Administrative Law Judge (hereinafter "ALJ"). *Id.* at para. 9. The ALJ issued his Findings of Fact, Conclusions of Law and Decision (hereinafter "ALJ's Decision") denying the refund claims on or about June 16, 2008. *Id.* Harrah's appealed the ALJ's Decision to the Commission. Following a hearing over which it presided, the Commission issued its final written decision on October 14, 2009 denying the refunds requested by Harrah's. See Commission Decision, with the ALJ's Decision, attached hereto as Exhibit 2.

On November 20, 2009, Harrah's filed its Complaint seeking to recover the use taxes it paid to the Department related to the four aircraft it purchased. See Complaint, p. 2-4. Harrah's alleges that by application of NRS 372.258 and NRS 374.263 use tax is not due, that the Department is wrongfully holding the tax that it remitted and that it is entitled to a refund. Harrah's seeks as its remedy:

1. A judicial determination that its purchase and use of the four aircraft meet the requirements of NRS 372.258 and NRS 374.263 and that therefore use tax does not apply;
2. A judicial determination that it is entitled to a refund in the amount of $8,626,042.60, plus interest calculated in accordance with NRS 372.695 and NRS 374.700;
3. The costs of suit[1]; and,

[1] Not available in a Petition for Judicial Review.

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4. Such other relief as this Court deems appropriate under the circumstances.

Complaint, p. 4-5.

The issues raised by Harrah's in its Complaint were adjudicated through administrative proceedings before the Administrative Law Judge and the Commission and are the subject of a final decision of the Commission. See Commission Decision attached hereto as Exhibit 2. Though the Commission Decision is a final decision for purposes of judicial review pursuant to NRS 360.245, Harrah's did not file a Petition for Judicial Review pursuant to NRS Chapter 233B but filed a Complaint citing NRS 372.680.

By filing a Complaint as opposed to a Petition for Judicial Review, Harrah's has initiated a civil law suit against the Department. In the Complaint, however, Harrah's admits in its factual allegations that it had the opportunity to offer its version of the facts and argue the issues, that the matter was submitted on stipulated facts to an Administrative Law Judge for a decision, that the Administrative Law Judge issued Findings of Fact, Conclusions of Law and Decision denying the refund claims and that a hearing was later held before the Commission the result of which was that the Commission affirmed and adopted the Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge as its final decision. See Complaint, para. 9 and 10.

## II. ARGUMENT

### A. STANDARD OF REVIEW

Harrah's Complaint should be dismissed pursuant to NRCP Rule 12(b), which states in relevant part, "every defense . . . to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . . (5) failure to state a claim upon which relief can be granted . . .."

When reviewing an order granting a motion to dismiss, the court considers whether the challenged pleading sets forth allegations sufficient to establish the elements

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Dismissal is appropriate where it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief. *Simpson v. Mars*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997); *Buzz Stew, LLC v. City of N. Las Vegas*, __ Nev. __, 181 P.3d 670, 672 (Adv. Op. 21, April 17, 2008). The pleadings must be liberally construed, and all factual allegations in the complaint accepted as true. *Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000).

**B. A PETITION FOR JUDICIAL REVIEW IS THE PROPER MEANS OF BRINGING THIS MATTER BEFORE THIS COURT**

Harrah's has chosen to file this action as a Complaint. To the best of the Department's knowledge and belief Harrah's did not file a Petition for Judicial Review of the Commission's decision.[2] The Complaint was served on the Department and the Office of the Attorney General.

Pursuant to the Nevada Rules of Civil Procedure a Complaint requires that an answer be filed and ultimately that a trial on the merits is held. The foregoing procedure is inappropriate to the appeal of a state agency decision. NRS 233B.130 et. seq. With the adoption of the Administrative Procedures Act, NRS 233B, in 1965, the Legislature has stated its intention that the provisions in such chapter "are the exclusive means of *judicial review of, or judicial action concerning*, a final decision in a contested case involving an agency to which this chapter applies." NRS 233B130(6) (emphasis added).

The provision under which Harrah's chose to file suit, NRS 372.680, was revised in 1999. Following the revision, NRS 372.680 provides:

> 1. Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by the Nevada Tax Commission, the claimant may bring an action against the Department on the grounds set forth in the claim in a court of competent jurisdiction in Carson City, the county of this State where the claimant resides or

[2]Pursuant to NRS 233B.130(5) a person filing a Petition for Judicial Review has 45 days to serve the Petition on the agency and every party. No such Petition has been served to date and the 45 days from the last date to file a Petition has passed.



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> maintains his principle place of business or a county in which any relevant proceedings were conducted by the Department, for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.
>
> 2. Failure to bring an action within the time specified constitutes a waiver of any demand against the State on account of alleged overpayments.

(emphasis added). NRS 372.680 speaks specifically to filing a claim for refund in district court after a final decision by **the Commission**. Id. Prior to 1999, a taxpayer could go straight to district court after the denial of the claim by **the Department** without going through an administrative hearing procedure. The change to a decision by the Commission ensured that there would be an administrative hearing. NRS 372.680 does not provide authority for a trial de novo. There is ambiguity as to whether NRS 372.680 seeks to provide some other remedy than appellate review to a taxpayer aggrieved by a decision of the Commission.

The Nevada Supreme Court in *Hansen-Neiderhauser v. Nevada State Tax Comm'n*, 81 Nev. 307, 402 P.2d 480 (1965), discusses NRS 372.680 prior to the passage of the Administrative Procedures Act. Clearly a civil remedy for claims of overpayment existed prior to the enactment of NRS Chapter 233B. In the legislative intent section of NRS Chapter 233B it states that "provisions of this chapter are intended to supplement statutes applicable to specific agencies." NRS 233B.020(2). Because of the ambiguity regarding the remedy available to the taxpayer seeking a refund that is aggrieved by a final decision by the Commission it is appropriate to look to the legislative history for clarification. See *Chanos v.* Nevada *Tax Comm'n*, _____ Nev. __ , 181 P.3d 675, 680-681 (2008).

A review of the legislative history from the 1999 changes to NRS 372.680 clears up any ambiguity about the remedy available. In a memorandum dated May 7, 1999 to Assemblyman Bernie Anderson, Chairman, Assembly Committee on Judiciary from Norm

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Azevedo, Sr. Deputy Attorney General regarding *Senate Bill (S.B.)* 362 and the changes to NRS 372.680 it states:

> With the exception of Section 13 of *S.B.* 362, the remaining sections delineated above address the applicable procedures to follow in a claim for refund. Prior to *S.B.* 362, refund claims had not been subject to the requirements of chapter 233B of the Nevada Revised Statutes. Historically, if a taxpayer filed a claim for refund with the Nevada Department of Taxation, which was denied by the Nevada Department of Taxation, the taxpayer was required to file an action in district court in order to contest the denial. The language of *S.B.* 362 now changes this procedural route. In the event that S.B. 362 becomes law, a taxpayer whose claim for refund is denied by the Department to (sic) Taxation will proceed initially to an administrative hearing officer for an administrative trial. In the event the taxpayer is aggrieved by the decision of the administrative hearing officer, the taxpayer may appeal the hearing officer's decision to the Nevada Tax Commission for an administrative appellate review. In the event the taxpayer is still aggrieved after a Tax Commission decision, the taxpayer may file a petition with a district court in a judicial review proceeding. It is this filing of a petition for judicial review which is the subject of the venue provisions in *S.B.* 362. Thus, *S.B.* 362 contemplates a change from past practice where refund claims upon passage of *S.B.* 362 will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes.

See Exhibit 3. Mr. Azevedo's explanation is reiterated by other documents from the legislative record. Mr. Azvedo provided testimony to the Senate Committee on Taxation on March 23, 1999, which was recorded as follows:

> [T]his particular provision was addressed in NRS chapter 232B (sic) and he did not see a problem with it being brought to other courts in the state. He explained the purpose of this bill and what it would achieve. He said the amendments clarified the language with great specificity so that in almost every instance the sequence would be hearing officer, the tax commission, and, if it went to a court, it would be pursuant to NRS chapter 233B in the form of a petition for judicial review. He said NRS chapter 233B would address most sales- and use-tax statutes that go to the commission.

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See Exhibit 4. The Bill Explanation provided as Exhibit G to the Assembly Committee on Taxation on May 6, 1999 states further that change to NRS 372.680 "[p]rovides that an action for judicial review of a claim for refund of sales tax follows a decision of the tax commission, not the department of taxation, and that such action may be brought in Clark County[3] as well as Carson City." *See* Exhibit 5, Sect. 33.

Mr. Azevedo in his memorandum to Assemblyman Anderson succinctly stated the procedure a taxpayer is required to follow pursuant to NRS 372.680. Harrah's refund claims were originally heard by an Administrative Law Judge. When Harrah's was aggrieved by the decision of the Administrative Law Judge, Harrah's appealed the Findings of Fact, Conclusions of Law and Decision to the Commission for an administrative appellate review. When Harrah's was still aggrieved following the Commission's decision, Harrah's had the option to file a petition with a district court in a judicial review proceeding.

A July 1990 publication for the State Bar of Nevada, entitled "The Basics of Nevada Administrative Law" sets forth the basis for applying judicial review to final administrative decisions. It states:

> Judicial review is designed to expedite the passage of an administrative case through the judicial system. It is also meant to minimize the intrusion of courts into administrative functions, such as fact-finding, while relieving district courts of the burden and expense of trying an administrative case as if the case had been filed as an original matter in district court.

55-JUL INALIA 19, July 1990, The Basics of Nevada Administrative Law, p. 6. The article goes on to discuss the reasons why trial de novo is disfavored in administrative cases and why cases involving trial de novo have been reversed by the Nevada Supreme Court:

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[3] Clark County was later dropped from the language. As adopted the venue language in NRS 372.680 mirrored the venue language in NRS 233B.130.



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> Litigants who have successfully convinced a district court to dispense with a review of the administrative record and hold a trial de novo have repeatedly had their original efforts reversed by the Nevada Supreme Court. Those reversals are entirely salutary. Trial de novo evades an administrative body's 'judgment based upon its specialized experience and knowledge.' It is also a particularly direct intrusion on an agency's fact-finding function.
>
> Trial de novo further destroys the effectiveness of an administrative body and the administrative process by relegating an administrative hearing to 'a meaningless, formal, preliminary, which places 'upon the courts the full administrative burden of factual determination.' The waste of administrative and judicial resources inherent in a trial de novo is obvious. The only time a trial de novo should occur is in the rare instances where it is specifically provided for by statute.

*Id.* (citations omitted). The article cites NRS 607.215 as an example of a specific statute that provides for trial de novo. Id. at fn. 113. NRS 607.215(3) states, "[u]pon a petition for judicial review, the court may order trial de novo." There is no applicable statute in the case at hand that specifically authorizes a trial de novo. The language in NRS 372.680, the statute at issue, states that a claimant "may bring an action." NRS 372.680 contains no mention of a right to trial de novo and falls short of granting the court jurisdiction to order a trial de novo.

One of the cases cited in the article, *Nevada Tax Commission v. Hicks*, 73 Nev. 115, 310 P.2d 852 (1957), discusses the policy against a trial de novo after an agency decision. The full quote from the *Hicks* case, parts of which were included in the citation above, is as follows:

> It should be apparent that if trial de novo is permitted here it would completely destroy the effectiveness of the tax commission as an expert investigative board. The most perfunctory showing could be made before the board by a licensee with knowledge that the matter would ultimately be decided by the courts upon full evidentiary consideration. Trial de novo, in effect, could relegate the commission hearing to a meaningless, formal, preliminary and place upon the courts the full administrative burden of factual determination.

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Las Vegas, NV 89101

*Id.* at 123, 856. See also, *Las Vegas Valley Water District v. Curtis Park Manor Water Users Association*, 98 Nev. 275, 646 P.2d 549 (1982). Though the *Hicks* case dealt with a gaming licensee, and is no longer good on another part of law, the reasoning applies equally to the case at hand. Allowing this action to proceed as a trial de novo would render meaningless the expertise of the Commission as well as the record that was before it.

Based on the relevant statutes and the doctrine of judicial economy it is clear that this matter should proceed as a Petition for Judicial Review.[4] Inexplicably, rather than preserve their right to review by filing a Petition for Judicial Review, Harrah's has instead filed a civil Complaint and seeks a new civil court proceeding. Harrah's exercised its right to the administrative process, received an unfavorable decision from the ALJ, received and unfavorable decision from the Commission, accumulated a sizeable administrative record, and failed to timely serve a Petition for Judicial Review on the Commission, the Department, or the Office of the Attorney General. The decision of the Commission is now final and preclusive.

### C. CHANGES IN NRS 233B AND IN NRS 372.680 REFLECT LEGISLATIVE INTENT THAT THIS COURT'S JURISDICTION IS LIMITED TO JUDICIAL REVIEW.

Prior to 1989, the NRS Chapter 233B specifically provided that a trial de novo was available, if provided for by an agency's statutes outside of NRS Chapter 233B. At the time NRS 233B.130(1) read in pertinent part:

> Any party aggrieved by a final decision in a contested case is entitled to judicial review thereof under this chapter. Where appeal is provided within an agency, only the decision at the highest level is reviewable unless otherwise provided by statutes. This chapter does not limit utilization

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[4] See Order to Proceed as Petition for Judicial Review, filed in the First Judicial District Court, Case No. 09 OC 00016 1B attached hereto as Exhibit 6 (stating that the proceedings in a tax refund case that had been presented to a hearing officer and the Commission are controlled by NRS 233B.130(6). Further stating that the plaintiff was "not entitled to a second evidentiary hearing in district court, but is *entitled to judicial review* . . ." This order has been stayed pending further review).

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Las Vegas, NV 89101

> of trial de novo to review a final decision where provided by statute, but this chapter provides an alternative means of review in those cases.

The act of May 30, 1989, ch. 716, §6, *Assembly Bill 884, Before the Committee on Government Affairs*, 1989 Nev. Stat. 3. The 1989 legislature removed this language and replaced it with the current language in NRS 233B.130(6) which states that the provisions of NRS Chapter 233B are "the exclusive means of judicial review of, or judicial action concerning, a final decision in a contested case involving an agency to which [the] chapter applies." The legislature specifically removed the authorization to use a trial de novo and replaced it with language stating that the exclusive means for a court to exercise jurisdiction over a final decision was by way of judicial review. In testimony before the Assembly, Mr. Richard Campbell, Chairman of the state bar's Administrative Law Committee, explained the reasoning for the changes made by AB 884. The minutes state:

> He indicated one problem with administrative law is that each agency has its own judicial review provision but it is incomplete and contains no provision for procedures before the courts. He also pointed out it is not clear whether NRS 233 (sic) or the agency's law applies thereby creating general confusion among practitioners and the courts. He indicated he spoke with several judges who urged the Administrative Law Committee to clarify such procedures
>
> . . ..

Minutes of the Nevada State Legislature, Assembly Committee on Government Affairs, page 7, June 6, 1989. Mr. Campbell explained the importance of allowing administrative agencies to exercise their expertise in a given area without interference by the courts. The minutes further provide:

> Mr. BcGaughey referred to page 2, line 28, 'The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact.' He asked Mr. Campbell to explain that statement. Mr. Campbell replied the Administrative Law Committee does not want the courts to substitute their expertise for the expertise of the administrative agency. Mr. Sourwine mentioned that this language exists in present law.

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> Mr. Campbell explained the court is not required to affirm the decision of an agency. Mr. Sourwine said AB 884 allows the court to modify or reverse an agency decision if it is clearly erroneous in view of reliable evidence on the whole record. Since the court does not hear the testimony of witnesses, the court is not in a position to judge credibility. Therefore, in reviewing records of an administrative agency, the court merely looks for evidence in the record that supports the agency's decision. At that point, the court defers to the agency's expertise in the particular area.

*Id.* at 8.

Standing alone, NRS 372.680 fits the description from the legislative history cited above of an agency provision that is incomplete and does not specify the nature of the procedure in court. The statute was changed to read that an action would follow a decision of the Commission, not a decision of the Department. The change ensured that requests for refund would fall within the purview of a contested case before an administrative body. The statutory change in 1999 denotes an effort on the part of the legislature to clarify the relationship between NRS 372.680 and NRS Chapter 233B.

The following legislative changes in this area demonstrate the legislative intent that all final decisions by the NTC be subject to judicial review:

1989

The legislature removes language permitting original actions when a statute authorizes such an action and replaces it with the language in NRS Chapter 233B.130(6): "The provisions of this chapter are the exclusive means of judicial review of, or judicial action concerning, a final decision in a contested case involving an agency to which this chapter applies." (emphasis added).

1997

The legislature adds the language in NRS 360.245(5) that states, "A decision of the Nevada Tax Commission is a final decision for the purpose of judicial review." (emphasis added).

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1999

Prior to 1999, NRS 372.680 permitted an action for a claim for refund to be filed once a refund claim had been filed with the Department without an administrative proceeding. The legislature changed the language and it now reads in pertinent part: "Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by the Nevada Tax Commission, the claimant may bring an action against the Department on the grounds set forth in the claim . . .." NRS 372.680 (emphasis added). "Thus, [the legislation] contemplates a change from past practice where refund claims upon passage of [the legislation] will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes." Memorandum dated May 7, 1999 to Assemblyman Bernie Anderson, Chairman, Assembly Committee on Judiciary from Norm Azevedo, Sr. Deputy Attorney General (emphasis added).

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**D. FAILURE TO FILE A TIMELY PETITION FOR JUDICIAL REVIEW DEPRIVES THIS COURT OF JURISDICTION TO HEAR THIS MATTER**

NRS 233B.130 states in pertinent part:

1. Any party who is:
2. Identified as a party of record by an agency in an administrative proceeding; and
3. Aggrieved by a final decision in a contested case, is entitled to judicial review of the decision. Where appeal is provided within an agency, only the decision at the highest level is reviewable unless a decision made at a lower level in the agency is made final by statute. Any preliminary, procedural or intermediate act or ruling by an agency in a contested case is reviewable if review of the final decision of the agency would not provide an adequate remedy
4. Petitions for judicial review must:
5. Name as respondents the agency and all parties of record to the administrative proceeding;
6. Be instituted by filing a petition in the district court in and for Carson City, in and for the county where the agency proceeding occurred; and
7. Be filed within 30 days after service of the final decision of the agency.
8. Cross-petitions for judicial review must be filed within 10 days after service of a petition for judicial review.

The final decision by the Commission was dated October 14, 2009. Thirty days from the date of service, as provided in NRS 233B.130(2)(c), would have been on or about November 14, 2009. Harrah's filed its Complaint on November 20, 2009 and even if the Complaint were deemed to be a Petition for Judicial Review it was still undeniably filed after the 30 day period for filing a Petition for Judicial Review. The sole means of this court taking action in this administrative case or reviewing the final decision by the Commission was by way of a Petition for Judicial Review. NRS 233B.130(6). No Petition for Judicial Review was filed. The failure to file a Petition for Judicial Review in a timely manner is jurisdictional. *Kame v. Employment Sec. Dep't.*, 105 Nev. 22, 25, 769 P.2d 66, 67 (1989). The Nevada Supreme Court in *Kame* wrote:

> When a party seeks judicial review of an administrative decision, strict compliance with the statutory requirements for such review is a precondition to jurisdiction by the court of judicial review. . .Noncompliance with the requirements is grounds for dismissal of the appeal...Thus, the time period for filing a petition for judicial review of an administrative decision is mandatory and jurisdictional...In the past, this court has upheld the dismissal of appeals for failure to timely commence them.

*Id.* at 25, 68 (citations omitted).

Judicial review was the only means for Harrah's to access a court for action on the claims for refund heard by the Commission. Instead, Harrah's filed a civil Complaint. Harrah's Complaint should be dismissed.

**E. THIS CIVIL ACTION IS BARRED BY THE DOCTRINE OF ADMINISTRATIVE RES JUDICATA**

Nevada has adopted a general rule of administrative res judicata. *Britton v. City of N. Las Vegas*, 106 Nev. 690, 799 P.2d 568 (1990). The Nevada Supreme Court in *Britton* identifies three inquiries that are pertinent to the application of administrative res judicata. *Id.* at 692-693 and 569-570. The inquires are "(1) whether the issue decided in the prior adjudication was identical to the issue presented in the action in question; (2) whether there was a final judgment on the merits; and (3) whether *the party against*

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whom the judgment is asserted was a party, or in privity with a party to the prior adjudication." *Id.*

If the factors from *Britton* are applied to the facts alleged in the Complaint, it is clear that administrative res judicata applies. The first factor is whether the issue decided in the prior adjudication was identical to the issue presented in the action in question. The issues decided in the previous action are outlined in the Commission's Decision. This court, in reviewing the action of the Commission, is limited to the record that was before the Commission. NRS 233B.135(1)(b). Since the court is so limited, the issues decided by the Commission are identical to the issues that are properly before this court.

The second factor is whether there was a final decision on the merits. Pursuant to NRS 360.245(5), decisions of the Commission are considered final decisions for purposes of judicial review. Moreover, because no Petition for Judicial Review has been filed and the date for filing one has passed, the decision by the Commission is final. As is apparent from the Complaint, the Commission's decision was a decision on the merits of Harrah's claims for refund. See Complaint, para. 9-10.

The final factor is whether the party against whom the judgment is asserted was a party, or in privity with a party, to the prior adjudication. The Commission's Decision in the administrative proceeding below was against Harrah's. The judgment is being asserted against Harrah's in the case at hand.

The Court further addressed the doctrine of administrative res judicata in a case that, like the present case, related to a request for refund of taxes. *Campbell v. Dep't of Taxation*, 108 Nev. 215, 827 P.2d 833 (1992). The facts in *Campbell* were similar in many ways to the current case. Like the current case there had been unsuccessful appeals before an administrative hearing officer and the Nevada Tax Commission. *Campbell* at 216, 834. The taxpayer in *Campbell* also failed to file a Petition for Judicial Review and instead filed a separate action pursuant to NRS 372.680. The district court judge granted summary judgment in favor of the Department on the grounds that "all of

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Las Vegas, NV 89101

the elements necessary to apply the doctrine of res judicata to the decision of the administrative tribunal . . . exist in this case." *Campbell* at 218, 835 (quoting the district court decision). A significant difference between *Campbell* and the current case is that in *Campbell* the taxpayer did not pay the taxes until after he had been through the administrative procedure, whereas in the current case the taxpayer paid the taxes prior to going through the administrative procedure. See Complaint, para. 3 through 7.

The Nevada Supreme Court, while reaffirming the doctrine of administrative res judicata, concluded that there were unique circumstances involved in *Campbell* that justified a different result than granting summary judgment.[5] The Court remanded the case for judicial review after making clear that "pursuant to *Britton*, the Campbells do not have a right to a second evidentiary hearing." *Campbell* at 219, 836 (emphasis added).

Because Harrah's failed to file a Petition for Judicial Review and because there does not exist any of the circumstances that were unique to the *Campbell* case, Harrah's Complaint should be dismissed pursuant to the doctrine of administrative res judicata.

**F. THIS CIVIL ACTION IS BARRED BY THE DOCTRINE OF CLAIM PRECLUSION**

The Court in *Five Star Capital Corp. v. Ruby*, __ Nev. __, 194 P.3d 709, 711 (2008) does not specifically discuss administrative res judicata, but does discuss in depth the term res judicata and breaks down the difference between claim preclusion and issue preclusion. The *Five Star* Court wrote:

> In addressing claim preclusion the *Tarkanian* court stated that the doctrine 'is triggered when a judgment is entered. A valid and final judgment on a claim precludes a second action on that claim or any part of it.' Further, the court recognized that the claim preclusion doctrine 'embraces all grounds of recovery that were asserted in a suit, as well as those that could have been asserted, and thus has a broader reach' than the issue preclusion doctrine.

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[5] Those unique circumstances included payment of the taxes under protest in reliance on instructions from the Department, which limited their subsequent remedies. At the time the statute allowed an action to be filed after the initial denial of a refund by the Department. As noted above in 1999 the statute was amended to require denial by the Tax Commission prior to filing an action for judicial review in district court.



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Las Vegas, NV 89101

*Id.* at 711. The Court then set forth the test for claim preclusion as follows:

> We begin by setting forth the three-part test for determining whether claim preclusion should apply: (1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case. These three factors in varying language, are used by the majority of the state and federal courts. This test maintains the well-established principle that claim preclusion applies to all grounds of recovery that were or could have been brought in the first case.

*Id.* at 713.

Applying those factors to the current case it is clear that the parties, Harrah's and the Department, are the same in the administrative proceeding below and in the Complaint. As argued above, the judgment by the Commission is final.

The third factor is whether the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case. NRS 233B.130 states that a party may file for judicial review if they are "[a]ggrieved by a final decision in a contested case." NRS 233B.130(1)(b). The court in an action for judicial review is limited to the record before the agency. NRS 233B.135(1)(b). NRS 372.680 states a taxpayer may file an action "after a final decision upon a claim filed pursuant to this chapter is rendered by the Nevada Tax Commission, the claimant may bring an action against the Department on the grounds set forth in the claim..." So under both NRS Chapter 233B and under NRS 372.680 Harrah's may not bring any claims that have not been actually decided below by the Commission. All the factors are met and this matter should be dismissed based on the doctrine of claim preclusion.

### G. THIS CIVIL ACTION IS BARRED BY THE DOCTRINE OF ISSUE PRECLUSION

The *Five Star* case also addressed the doctrine of issue preclusion. The Court indicated the following factors were necessary for the application of issue preclusion:

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1. The issue decided in the prior litigation must be identical to the issue presented in the current action;
2. The initial ruling must have been on the merits and have become final; ...
3. The party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation and;
4. The issue was actually and necessarily litigated.

*Five Star* at 713.

The Commission in its final decision affirmed the ALJ's decision in its entirety. See Commission's Decision attached hereto as Exhibit 2. In its Complaint Harrah's states that the "Commission affirmed the decision of the Administrative Law Judge." Complaint, para. 10. Harrah's requests "a judicial determination that Harrah's purchase and subsequent use of the four aircraft at issue meet the requirements of NRS 372.258 and NRS 374.263 so as to be considered tangible personal property purchased for use in interstate commerce and not purchased for storage, use or other consumption in Nevada." Complaint, p. 5, ln. 21-24. The issues raised in Harrah's Complaint were raised and adjudicated in the administrative proceedings presided over by the ALJ and later the Commission. See Commission's Decision attached hereto as Exhibit 2. Because Harrah's issues raised in its Complaint were raised by the claims for refund filed by Harrah's and adjudicated by the ALJ and the Commission, they were actually and necessarily litigated in the administrative proceedings below. The Commission's decision is final and Harrah's should not be permitted to re-litigate matters that have been adjudicated and finally decided.

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## CONCLUSION

Harrah's, by filing an original civil action, is asking this court to preside over the re-litigation of issues that have been the subject of litigation for several years before the Department and the Commission. It would be a prodigious waste of judicial resources to start anew in a case that already has an administrative record and final decision.

Harrah's had an adequate legal remedy available through NRS Chapter 233B whereby this court could have reviewed the final decision of the Commission for violations of constitutional or statutory provisions, acting in excess of its authority, unlawful procedure or other error of law. This court could have determined whether the Commission's final decision was clearly erroneous in view of the evidence presented to it or whether the Commission acted in an arbitrary or capricious manner. If Harrah's was unhappy with this court's decision, it would have had the ability to appeal to the Nevada Supreme Court. By failing to file a Petition for Judicial Review within the statutory time limit under NRS 233B.130(2)(c), Harrah's has abandoned its rights to review and allowed the Commission's decision to become final.

Based on the doctrine of administrative res judicata, claim preclusion and issue preclusion, the Department respectfully requests that the court grant its Motion to Dismiss pursuant to NRCP 12(b)(5) and dismiss Harrah's Complaint with prejudice.

Respectfully submitted this 22nd day of January, 2010.

CATHERINE CORTEZ MASTO
Attorney General

By: _____
David J. Pope
Sr. Deputy Attorney General
Nevada State Bar No. 8617
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## CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on January 22, 2010, I deposited in the U.S. mail, postage prepaid, via First Class Mail and facsimile, a true and correct copy of the foregoing **MOTION TO DISMISS,** addressed as follows:

John S. Bartlett, Esq.
1201 Stewart St., Ste. 130
Carson City, NV 89706
(Fax No.: (775) 841-2172

Dated this 22nd day of January, 2010

An Employee of the State of Nevada
Attorney Generals office

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA DEPARTMENT OF TAXATION,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE KENNETH C. CORY,
Respondents,
and
HARRAH'S OPERATING COMPANY, INC.,
Real Party in Interest.

No. 56722



ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus and prohibition challenges a district court order determining that a use tax refund matter should proceed in the district court as an independent action subject to de novo review, rather than as a petition for judicial review under the Nevada Administrative Procedure Act, NRS Chapter 233B.[1]

Having reviewed the parties' filings, we conclude that writ relief is warranted. NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981). Recently, in Southern California Edison v. District Court, 127 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. No. 22, May 26, 2011), reh'g pending, we concluded that as the result of several amendments over the past several years, "NRS 372.680 now contemplates

[1]The Honorable Kristina Pickering, Justice, voluntarily recused herself from consideration of this matter.

judicial review, in accordance with NRS Chapter 233B, and a petition for judicial review under those statutes is the sole remedy after a final decision by the [Tax] Commission in regard to a sales and use tax refund matter." Accordingly, here, the district court improperly directed that the matter proceed as an independent action subject to de novo review; instead, the matter should proceed as a petition for judicial review under NRS Chapter 233B.

Petitioner argues that, in the event the court agrees that the matter must be brought as a petition for judicial review, this case must be dismissed because it was untimely filed under NRS Chapter 233B more than 30 days after service of the final agency decision. But even though NRS Chapter 233B applies generally, NRS 372.680 operates to provide a 90-day filing period; thus NRS 233B.130(2)(c)'s 30-day deadline to file a petition for judicial review does not apply here. A specific statute that conflicts with a general statute will take precedence over the general statute. Andersen Family Assocs. v. State Engineer, 124 Nev. 182, 187, 179 P.3d 1201, 1204 (2008). Accordingly, because it specifically applies to tax refund claims while NRS Chapter 233B applies generally to judicial review proceedings, NRS 372.680's 90-day provision takes precedence over NRS 233B.130's 30-day provision. See NRS 233B.020(2) ("The provisions of this chapter are intended to supplement [not supplant] statutes applicable to specific agencies. This chapter does not abrogate or limit additional requirements imposed on such agencies by statute or otherwise recognized by law.").

Consequently, we grant this petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to allow real party in interest to take any steps necessary to comply with the

applicable provisions of NRS Chapter 233B and to thereafter proceed with its review of this matter under that chapter.[2]

It is so ORDERED.

Douglas, C.J.
Douglas

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

cc: Hon. Kenneth C. Cory, District Judge
Attorney General/Las Vegas
John Bartlett, Attorney at Law
Eighth District Court Clerk

[2]In light of this order, petitioner's alternative request for a writ of prohibition is denied as moot.

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Nevada Dept. of Taxation



**IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
**IN AND FOR THE COUNTY OF WASHOE**

SIERRA PACIFIC POWER COMPANY, INC. and NEVADA POWER COMPANY, INC., jointly doing business as NV ENERGY,

Plaintiffs,

vs.

STATE OF NEVADA, ex rel., DEPARTMENT OF TAXATION,

Defendant.

**Case No.: CV09-03554**

**Dept. No.: I**



## MOTION TO DISMISS OR IN THE ALTERNATIVE PROCEED PURSUANT TO NRS CHAPTER 233B

Defendant State of Nevada ex rel. Department of Taxation (Department), by and through its attorney, Catherine Cortez Masto, Attorney General, by Gina C. Session, Chief Deputy Attorney General, hereby submits its Motion to Dismiss or in the Alternative Proceed Pursuant to NRS Chapter 233B in this matter. This motion is filed pursuant to NRCP Rule 12(b)(5), and also based upon the following memorandum of points and authorities, and the other papers and pleadings on file with the court in this matter.

### FACTS

Sierra Pacific Power Company, Inc. and Nevada Power Company, Inc., jointly doing business as NV Energy (NV Energy) filed a Complaint on December 8, 2009, to recover use

taxes paid to the Department on the use and consumption of out-of-state coal at a coal-fired power plant in Nevada. See Complaint, paragraphs 15-19. By filing a Complaint as opposed to a Petition for Judicial Review, NV Energy has initiated a civil law suit with the Department as Defendant. In the Complaint, NV Energy admits in its factual allegations that an administrative hearing was held by an Administrative Law Judge (ALJ) on March 14, 2008, and a Findings of Fact, Conclusions or Law and Decision was issued denying the refund. See Complaint, paragraph 17. The ALJ's decision was appealed to the Nevada Tax Commission (NTC) and a second administrative hearing was held on September 15, 2009. Clark County, City of Henderson, Humboldt County, City of Winnemucca and the Humboldt County Hospital District were parties to the administrative proceeding before the NTC. The NTC upheld the decision of the ALJ. See Complaint, paragraph 18. There exists an administrative record of documents, agendas, transcripts of hearings and administrative decisions in this case.

NV Energy has filed this action pursuant to NRS 372.680. NV Energy has not filed a Petition for Judicial Review of the NTC's decision. The Complaint was served on the Department and on the Office of the Attorney General. The Complaint was not served on any of the local governments that participated in the administrative proceeding. The Complaint includes Claims for Relief which are not available on a Petition for Judicial Review. The Complaint requests the cost of suit and other remedies not available in a Petition for Judicial Review.

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

## SUMMARY OF ARGUMENTS

This case raises issues regarding the proper interaction of NRS Chapter 233B and NRS 372.680.[1] It is the position of the Department that a decision by the Nevada Tax Commission (NTC) is final unless a party aggrieved by the decision files a Petition for Judicial Review. Because no Petition has been filed in this case, the NTC's decision is final and preclusive. Administrative res judicata applies and the case should be dismissed. There is no language in NRS 372.680 that authorizes a trial de novo. If the court chooses not to dismiss

[1] The sales and use tax statutes relevant to this case found in chapters 372 and 374 of the NRS are identical; hence only the statutes in Chapter 372 are cited herein.

the case, in the alternative the Department believes this matter should proceed pursuant to NRS Chapter 233B and not as a civil trial de novo.

## ARGUMENT

### A. STANDARD OF REVIEW

NV Energy's Complaint should be dismissed pursuant to NRCP Rule 12(b), which states in relevant part, "every defense . . . to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . . (5) failure to state a claim upon which relief can be granted. . ."

When reviewing an order granting a motion to dismiss, the court considers whether the challenged pleading sets forth allegations sufficient to establish the elements of a right to relief. *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 278, 21 P.3d 16, 19 (2001). Dismissal is appropriate where it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief. *Simpson v. Mars*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997); *Buzz Stew, LLC v. City of N. Las Vegas*, ___ Nev. ___, 181 P.3d 670, 672 (Adv Op 21, April 17, 2008). The pleadings must be liberally construed, and all factual allegations in the complaint accepted as true. *Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000).

### B. A PETITION FOR JUDICIAL REVIEW IS THE PROPER MEANS OF BRINGING THIS MATTER BEFORE THE COURT.

With the adoption of the Administrative Procedure Act, NRS Chapter 233B, in 1965, the Legislature has stated its intention that the provisions in that chapter "are the exclusive means of judicial review of, or judicial action concerning, a final decision in a contested case involving an agency to which this chapter applies." NRS 233B.130(6).

Both the Department and the NTC fall within the definition of "agency" provided in NRS 233B.031. The Department and the NTC are not exempt from the application of NRS Chapter 233B. NRS 233B.039. NRS 233B.039 sets out not only the agencies that are completely exempt from the application of NRS Chapter 233B, but also more specifically agencies whose

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

special statutory provisions prevail over the more general provisions of NRS Chapter 233B. See NRS 233B.039(3). The carve-out does not include any statutory provisions applicable to the Department or the NTC. The legislature could have easily included NRS 372.680 and the NTC's decisions regarding tax refunds in the list specifically exempt from the application of judicial review pursuant to NRS Chapter 233B, but the legislature did not do so. Because the NTC is not exempt NRS Chapter 233B applies to the NTC and its decisions.

The provision that NV Energy chose to file suit under, NRS 372.680, was revised in 1999. NRS 372.680 provides as follows:

> 1. Within 90 days **after a final decision upon a claim filed pursuant to this chapter is rendered by the Nevada Tax Commission, the claimant may bring an action against the Department on the grounds set forth in the claim** in a court of competent jurisdiction in Carson City, the county of this State where the claimant resides or maintains his principal place of business or a county in which any relevant proceedings were conducted by the Department, for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.
>
> 2. Failure to bring an action within the time specified constitutes a waiver of any demand against the State on account of alleged overpayments. [Emphasis added]

NRS 372.680 speaks specifically to filing a claim for refund in district court after a final decision by the NTC. Prior to 1999, a taxpayer could go straight to district court after the denial of the claim by the Department without going through an administrative hearing procedure. The change to a decision by the NTC ensured that there would be an administrative hearing. NRS 372.680 does not provide authority for a trial de novo. There is ambiguity as to whether NRS 372.680 seeks to provide some other remedy than appellate review to a taxpayer aggrieved by a decision of the NTC.

The Nevada Supreme Court in *Hansen-Neiderhauser v. Nevada State Tax Comm'n*, 81 Nev. 307, 402 P.2d 480 (1965), discusses NRS 372.680 prior to the passage of the Administrative Procedures Act. Clearly a civil remedy for claims of overpayment existed prior to the enactment of NRS Chapter 233B. In the legislative intent section of NRS Chapter 233B it states that "provisions of this chapter are intended to supplement statutes applicable to specific agencies." NRS 233B.020(2). Because of the ambiguity regarding the remedy

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

available to a taxpayer seeking a refund that is aggrieved by a final decision by the Commission it is appropriate to look to the legislative history for clarification. See *Chanos v. Nevada Tax Comm'n*, ___ Nev. ___, 181 P.3d 675, 680-681 (2008).

A review of the legislative history from the 1999 changes to NRS 372.680 clears up any ambiguity about the remedy available. In a memorandum dated May 7, 1999 to Assemblyman Bernie Anderson, Chairman, Assembly Committee on Judiciary from Norm Azevedo, Sr. Deputy Attorney General regarding *Senate Bill (S.B.)* 362 and the changes to NRS 372.680 it states:

> With the exception of Section 13 of *S.B.* 362, the remaining sections delineated above address the applicable procedures to follow in a claim for refund. Prior to *S.B.* 362, refund claims had not been subject to the requirements of chapter 233B of the Nevada Revised Statutes. Historically, if a taxpayer filed a claim for refund with the Nevada Department of Taxation, which was denied by the Nevada Department of Taxation, the taxpayer was required to file an action in district court in order to contest this denial. The language of *S.B.* 362 now changes this procedural route. In the event that *S.B.* 362 becomes law, a taxpayer whose claim for refund is denied by the Department to (sic) Taxation will proceed initially to an administrative hearing officer for an administrative trial. In the event the taxpayer is aggrieved by the decision of the administrative hearing officer, the taxpayer may appeal the hearing officer's decision to the Nevada Tax Commission for an administrative appellate review. In the event a taxpayer is still aggrieved after a Tax Commission decision, the taxpayer may file a petition with a district court in a judicial review proceeding. It is this filing of a petition for judicial review which is the subject of the venue provisions in *S.B.* 362. Thus, *S.B.* 362 contemplates a change from past practice where refund claims upon passage of *S.B.* 362 will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes.

See Exhibit 1.

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Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Mr. Azevedo's explanation is reiterated by other documents from the legislative record. Mr. Azevedo provided testimony to the Senate Committee on Taxation on March 23, 1999, which was recorded as follows:

> [T]his particular provision was addressed in NRS chapter 232B (sic) and he did not see a problem with it being brought to other courts in the state. He explained the purpose of this bill and what it would achieve. He said the amendments clarified the language with great specificity so that in almost every instance the sequence would be hearing officer, the tax commission, and, if it went to a court, it would be pursuant to NRS chapter 233B in the form of a petition for judicial review. He said NRS chapter 233B would address most sales- and use-tax statutes that go to the commission.

*See* Exhibit 2.

The Bill Explanation provided as Exhibit G to the Assembly Committee on Taxation on May 6, 1999 states further that change to NRS 372.680 "[p]rovides that an action for judicial review of a claim for refund of sales tax follows a decision of the tax commission, not the department of taxation, and that such action may be brought in Clark County[2] as well as Carson City." *See* Exhibit 3.

Mr. Azevedo in his memorandum to Assemblyman Anderson succinctly stated the procedure a taxpayer is required to follow pursuant to NRS 372.680. NV Energy was originally heard by an ALJ. When NV Energy was aggrieved by the decision of the administrative hearing officer, NV Energy appealed the hearing officer's decision to the NTC for an administrative appellate review. When NV Energy was still aggrieved after a NTC decision, NV Energy had the option to file a petition with a district court in a judicial review proceeding.

C. CHANGES IN NRS 233B AND IN NRS 372.680 REFLECT LEGISLATIVE INTENT THAT THIS COURT'S JURISDICTION IS LIMITED TOJUDICIAL REVIEW.

Prior to 1989 the NRS Chapter 233B specifically provided that a trial de novo was available, if provided for by an agency's statutes outside of NRS Chapter 233B. At that time NRS 233B.130(1) read in pertinent part:

> Any party aggrieved by a final decision in a contested case is entitled to judicial review thereof under this chapter. Where appeal

[2] Clark County was later dropped from the language. As adopted the venue language in NRS 372.680 mirrored the venue language in NRS 233B.130.



Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

> is provided within an agency, only the decision at the highest level is reviewable unless otherwise provided by statutes. This chapter does not limit utilization of trial de novo to review a final decision where provided by statute, but this chapter provides an alternative means of review in those cases.

The act of May 30, 1989, ch. 716, §6, *Assembly Bill 884, Before the Committee on Government Affairs, 1989 Nev. Stat. 3.*

The 1989 legislature removed this language and replaced it with the current language in NRS 233B.130(6) which states that the provisions of NRS Chapter 233B are the exclusive means of judicial review or judicial action concerning a final decision in a contested case involving an agency to which the chapter applies. The legislature specifically removed the authorization to use a trial de novo and replaced it with language stating that the exclusive means for a court to exercise jurisdiction over a final agency decision was by way of judicial review.

In testimony before the Assembly, Mr. Richard Campbell, Chairman of the state bar's Administrative Law Committee, explained the reasoning for the changes made by AB 884. The minutes state:

> He indicated one problem with administrative law is that each agency has its own judicial review provision but it is incomplete and contains no provision for procedures before the courts. He also pointed out it is not clear whether NRS 233 (sic) or the agency's law applies thereby creating general confusion among practitioners and the courts. He indicated he spoke with several judges who urged the Administrative Law Committee to clarify such procedures...

Minutes of the Nevada State Legislature, Assembly Committee on Government Affairs, page 7, June 6, 1989.

Mr. Campbell explained the importance of allowing administrative agencies to exercise their expertise in a given area without interference by the courts. The minutes further provide:

> Mr. McGaughey referred to page 2, line 28, 'The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact.' He asked Mr. Campbell to explain that statement. Mr. Campbell replied the Administrative Law Committee does not want the courts to substitute their expertise for the expertise of the administrative agency. Mr. Sourwine mentioned that this language exists in present law.

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

> Mr. Campbell explained the court is not required to affirm the decision of an agency. Mr. Sourwine said AB 884 allows the court to modify or reverse an agency decision if it is clearly erroneous in view of reliable evidence on the whole record. Since the court does not hear the testimony of witnesses, the court is not in a position to judge credibility. Therefore, in reviewing records of an administrative agency, the court merely looks for evidence in the record that supports the agency's decision. At that point, the court defers to the agency's expertise in the particular area.

*Id.* at 8.

Standing alone, NRS 372.680 fits the description from the legislative history cited above of an agency provision that is incomplete and does not specify the nature of the procedure in court. The statute was changed to read that an action would follow a decision of the NTC, not a decision of the Department. The change ensured that requests for refund would fall within the purview of a contested case before an administrative body. The statutory change in 1999 denotes an effort on the part of the legislature to clarify the relationship between NRS 372.680 and NRS Chapter 233B.

The following is a timeline of legislative changes in this area that demonstrate the legislative intent that all final decisions by the NTC be subject to judicial review:

<u>1989</u>

The legislature removes language permitting original actions when a statute authorizes such an action and replaces it with the language in NRS Chapter 233B.130(6): "The provisions of this chapter are the exclusive means of judicial review of, or **judicial action** concerning, **a final decision** in a contested case involving an agency to which this chapter applies." [emphasis added]

<u>1997</u>

The legislature adds the language in NRS 360.245(5) that states "A decision of the Nevada Tax Commission is **a final decision** for the purposes of judicial review." [emphasis added]

<u>1999</u>

Prior to 1999, NRS 372.680 permitted an action for a claim for refund to be filed once a

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

refund claim had been filed with the Department of Taxation without an administrative proceeding. The legislature changed the language and it now reads in pertinent part: "Within 90 days after **a final decision** upon a claim filed pursuant to this chapter is rendered by the **Nevada Tax Commission**, the claimant may bring **an action** against the Department on the grounds set forth in the claim..." [emphasis added] "Thus, [the legislation] contemplates a change from past practice where **refund claims** upon passage of [the legislation] will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes." Memorandum dated May 7, 1999 to Assemblyman Bernie Anderson, Chairman, Assembly Committee on Judiciary from Norm Azevedo, Sr. Deputy Attorney General. [emphasis added]

D. FAILURE TO FILE A TIMELY PETITION FOR JUDICIAL REVIEW DEPRIVES THIS COURT OF JURISDICTION TO HEAR THIS MATTER.

NRS 233B.130 states in pertinent part:

> 1. Any party who is:
> (a) Identified as a party of record by an agency in an administrative proceeding; and
> (b) Aggrieved by a final decision in a contested case,
> is entitled to judicial review of the decision. Where appeal is provided within an agency, only the decision at the highest level is reviewable unless a decision made at a lower level in the agency is made final by statute. Any preliminary, procedural or intermediate act or ruling by an agency in a contested case is reviewable if review of the final decision of the agency would not provide an adequate remedy.
>
> 2. Petitions for judicial review must:
> (a) Name as respondents the agency and all parties of record to the administrative proceeding;
> (b) Be instituted by filing a petition in the district court in and for Carson City, in and for the county in which the aggrieved party resides or in and for the county where the agency proceeding occurred; and
> (c) Be filed within 30 days after service of the final decision of the agency.
> Cross-petitions for judicial review must be filed within 10 days after service of a petition for judicial review.

The final decision by the NTC was dated October 23, 2009. Thirty days from the date

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

of service as provided in NRS 233B.130(2)(c) would have been on or about November 23, 2009. The sole means of this court taking action in this administrative case or reviewing the final decision by the NTC was by way of a Petition for Judicial Review. NRS 233B.130(6). No Petition for Judicial Review was filed. The failure to file a Petition for Judicial Review in a timely manner is jurisdictional. *Kame v. Employment Sec. Dep't*, 105 Nev. 22, 25, 769 P.2d 66, 67 (1989). The Nevada Supreme Court in *Kame* wrote:

> When a party seeks judicial review of an administrative decision, strict compliance with the statutory requirements for such review is a precondition to jurisdiction by the court of judicial review...Noncompliance with the requirements is grounds for dismissal of the appeal...Thus, the time period for filing a petition for judicial review of an administrative decision is mandatory and jurisdictional...In the past, this court has upheld the dismissal of appeals for failure to timely commence them.

*Id.* at 25, 68 (citations omitted).

Judicial review was the only means for NV Energy to access a court for action on the claims for refund heard by the NTC. Instead, NV Energy filed a civil action that was not served on all of the parties to the administrative proceedings. None of the local governmental entities that were parties to the administrative proceedings below have been served with the Complaint. The time for filing for judicial review is passed and the court lacks jurisdiction. NV Energy's Complaint should be dismissed.

E. THIS CIVIL ACTION IS BARRED BY THE DOCTRINE OF ADMINISTRATIVE RES JUDICATA.

Nevada has adopted a general rule of administrative res judicata. *Britton v. City of N. Las Vegas*, 106 Nev. 690, 799 P.2d 568 (1990). The Nevada Supreme Court in *Britton* identifies three inquiries that are pertinent to the application of administrative res judicata. *Id.* at 692-693 and 569-570. The inquiries are "(1) whether the issue decided in the prior adjudication was identical to the issue presented in the action in question; (2) whether there was a final judgment on the merits; and (3) whether the party against whom the judgment is asserted was a party, or in privity with a party to the prior adjudication." *Id.*

If the factors from *Britton* are applied to the facts alleged in the Complaint, it is clear

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

that administrative res judicata applies. The first factor is whether the issue decided in the prior adjudication was identical to the issue presented in the action in question. The issues decided in the previous action are outlined in the Complaint and regard the request for refund of use tax paid on out-of-state coal. This court in reviewing the action of the NTC is limited to the record that was before the Commission. NRS 233B.135(1)(b). The court is similarly limited by NRS 372.680. Since the court is so limited, the issues decided by the NTC are identical to the issues that are properly before this court.

The second factor is whether there was a final decision on the merits. Because no Petition for Judicial Review has been filed and the date for filing one has passed, the decision by the NTC is final. The NTC's decision was a decision on the merits of NV Energy's claims for refund. Complaint, paragraphs 16-18.

The final factor is whether the party against whom the judgment is asserted was a party, or in privity with a party to the prior adjudication. The NTC's judgment in the administrative proceeding below was against NV Energy. The judgment is being asserted against NV Energy in the current case.

The Court further addressed the doctrine of administrative res judicata in a case that, like the present case, related to a request for refund of taxes. *Campbell v. Dep't of Taxation*, 108 Nev. 215, 827 P.2d 833 (1992). The facts in *Campbell* were similar in many ways to the current case. Like the current case there had been unsuccessful appeals before an administrative hearing officer and the Nevada Tax Commission. *Campbell* at 216, 834. The taxpayer in *Campbell* also failed to file a Petition for Judicial Review and instead filed a separate action pursuant to NRS 372.680. The district court judge granted summary judgment in favor of the Department on the grounds that "all of the elements necessary to apply the doctrine of res judicata to the decision of the administrative tribunal...exist in this case." *Campbell* at 218, 835 (quoting the district court decision). A significant difference between *Campbell* and the current case is that in *Campbell* the taxpayer did not pay the taxes until after he had been through the administrative procedure, whereas in the current case the taxpayer paid the taxes prior to going through the administrative procedure. *See* Complaint,

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

paragraphs 15-16.

The Nevada Supreme Court, while reaffirming the doctrine of administrative res judicata, concluded that there were unique circumstances involved in *Campbell* that justified a different result than granting summary judgment.[3] The Court remanded the case for judicial review after making clear that "pursuant to *Britton*, the Campbells **do not have a right to a second evidentiary hearing.**" *Campbell* at 219, 836 (emphasis added).

Because NV Energy failed to file a Petition for Judicial Review and because there does not exist any of the circumstances that were unique to the *Campbell* case, NV Energy's Complaint should be dismissed pursuant to the doctrine of administrative res judicata.

F. THIS CIVIL ACTION IS BARRED BY THE DOCTRINE OF CLAIM PRECLUSION.

The Court in *Five Star Capital Corp. v. Ruby*, ___ Nev. ___,194 P.3d 709, 711 (2008) does not specifically discuss administrative res judicata, but does discuss in depth the term res judicata and breaks down the differences between claim preclusion and issue preclusion. The *Five Star* Court wrote:

> In addressing claim preclusion the *Tarkanian* court stated that the doctrine 'is triggered when a judgment is entered. A valid and final judgment on a claim precludes a second action on that claim or any part of it.' Further, the court recognized that the claim preclusion doctrine 'embraces all grounds of recovery that were asserted in a suit, as well as those that could have been asserted, and thus has a broader reach' than the issue preclusion doctrine.

*Id.* at 711.

The Court then set forth the test for claim preclusion as follows:

> We begin by setting forth the three-part test for determining whether claim preclusion should apply: (1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case. These three factors in varying language, are used by the majority of the state and federal courts. This test maintains the well-established principle that claim preclusion applies to all grounds of recovery that were or could have been brought in the first case.

*Id.* at 713.

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[3] Those unique circumstances included payment of the taxes under protest in reliance on instructions from the Department, which limited their subsequent remedies. At the time the statute allowed an action to be filed after the initial denial of a refund by the Department. As noted above in 1999 the statute was amended to require denial by the Tax Commission prior to filing an action for judicial review in district court.



Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Applying those factors to the current case it is clear that the parties, NV Energy and the Department, are the same in the administrative proceeding below and in the Complaint. As argued above, the judgment by the NTC is final.

The third factor is whether the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case. NRS 233B.130 states that a party may file for judicial review if they are "[a]ggrieved by a final decision in a contested case." NRS 233B.130(1)(b). The court in an action for judicial review is limited to the record before the agency. NRS 233B.135(1)(b). NRS 372.680 states a taxpayer may file an action "after a final decision upon a claim filed pursuant to this chapter is rendered by the Nevada Tax Commission, the claimant may bring an action against the Department on the grounds set forth in the claim..." So under both NRS Chapter 233B and under NRS 372.680 NV Energy may not bring any claims that have not been actually decided below by the Commission. The final factor of the test for claim for claim preclusion is met in this case. This matter should be dismissed based on the doctrine of claim preclusion.

G. THIS CIVIL ACTION IS BARRED BY THE DOCTRINE OF ISSUE PRECLUSION.

The *Five Star* case also addressed the doctrine of issue preclusion. The Court indicated the following factors were necessary for the application of issue preclusion:

> (1) the issue decided in the prior litigation must be identical to the issue presented in the current action;
> (2) the initial ruling must have been on the merits and have become final;...
> (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation and;
> (4) the issue was actually and necessarily litigated.

*Five Star* at 713.

Because all of the issues above were raised by the claims for refund filed by NV Energy, they were actually and necessarily litigated in the administrative proceedings below. The NTC's decision is final and the NTC's decisions on the issues actually raised and litigated are preclusive. NV Energy should not be permitted to re-litigate matters that have already been finally decided.

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Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

H. IN THE ALTERNATIVE THE MATTER SHOULD PROCEED PURSUANT TO NRS 233B.

1. AFTER A FINAL DECISION BY AN ADMINISTRATIVE AGENCY THE COURT'S JURISDICTION IS LIMITED TO JUDICIAL REVIEW.

If the court does not agree that this case should be dismissed pursuant to the doctrine of administrative res judicata and this case is allowed to proceed, the proceedings should be governed by NRS Chapter 233B. The Nevada Supreme Court in *Campbell v. State of Nevada*, 108 Nev. 215, 827 P.2d 833 (1992), rather than apply administrative res judicata to a complaint that was timely filed for purposes of judicial review, ordered that the case be subject to judicial review. *Id.* at 219, 836. The Court specifically found that "pursuant to *Britton*, the Campbells do not have a right to a second evidentiary hearing. NV Energy likewise, has no right to a second evidentiary hearing.

The Court's decision in *Campbell* is based on sound and long-standing public policy considerations. A July 1990 publication for the State Bar of Nevada, entitled "The Basics of Nevada Administrative Law" sets forth the basis for applying judicial review to final administrative decisions. It states:

> Judicial review is designed to expedite the passage of an administrative case through the judicial system. It is also meant to minimize the intrusion of courts into administrative functions, such as fact-finding, while relieving district courts of the burden and expense of trying an administrative case as if the case had been filed as an original matter in district court.

INTER ALIA, July 1990, The Basics of Nevada Administrative Law, p. 8.

The article goes on to discuss the reasons why trial de novo is disfavored in administrative cases and why cases involving trial de novo have been frequently reversed by the Nevada Supreme Court:

> Litigants who have successfully convinced a district court to dispense with a review of the administrative record and hold a trial de novo have repeatedly had their original efforts reversed by the Nevada Supreme Court. Those reversals are entirely salutary. Trial de novo evades an administrative body's 'judgment based upon its specialized experience and knowledge.' It is also a particularly direct intrusion on an agency's fact-finding function.

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

> Trial de novo further destroys the effectiveness of an administrative body and the administrative process by relegating an administrative hearing to 'a meaningless, formal, preliminary, which places 'upon the courts the full administrative burden of factual determination.' The waste of administrative and judicial resources inherent in a trial de novo is obvious. The only time a trial de novo should occur is in the rare instances where it is specifically provided for by statute.

*Id.* (citations omitted).

The article cites NRS 607.215 as an example of a specific statute that provides for trial de novo. NRS 607.215(3) states "Upon a petition for judicial review, the court may order trial de novo." There is no applicable statute in the current case that specifically *authorizes* a trial de novo. The language in the statute at issue, NRS 372.680, states a claimant "may bring an action". There is no mention in NRS 372.680 to a right to trial de novo rather than judicial review. The statute falls far short of granting jurisdiction to the court to order a trial de novo.

One of the cases cited in the article, *Nevada Tax Commission v. Hicks*, 73 Nev. 115, 310 P.2d 852 (1957), discusses the policy against a trial de novo after an agency decision. The full quote from *Hicks*, parts of which were included in the citation above, is as follows:

> It should be apparent that if trial de novo is permitted here it would completely destroy the effectiveness of the tax commission as an expert investigative board. The most perfunctory showing could be made before the board by a licensee with knowledge that the matter would ultimately be decided by the courts upon full evidentiary consideration. Trial de novo, in effect, could relegate the commission hearing to a meaningless, formal, preliminary and place upon the courts the full administrative burden of factual determination.

*Id.* at 123, 856. *See also, Las Vegas Valley Water District v. Curtis Park Manor Water Users Association*, 98 Nev. 275, 646 P.2d 549 (1982).

While *Hicks* dealt with a gaming licensee, the reasoning applies equally to the case before this court. Permitting this action to go forward as a trial de novo would render meaningless the expertise of the Tax Commission as well as the extensive record that was before it.

*Hicks* and other cases recognize the value of having the administrative body with expertise in an area responsible for weighing and considering the facts in fields where it has a

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

particular competence. *Id.*, *see also*, *Clark County Board of Commissioners v. Taggart*, 96 Nev. 732, 734-35, 615 P.2d 965, 967 (1980); *Spilotro v. State of Nevada*, 99 Nev. 187, 190, 661 P.2d 467, 469 (1983); *Sports Form, Inc. v. LeRoy's Horse and Sports Place*, 108 Nev. 37, 41, 823 P.2d 901, 903 (1992)(discussing the doctrine of primary jurisdiction); *Richardson Construction v. Clark County School District*; 123 Nev. 61, 156 P.3d 21, 24 (2007)(discussing the doctrine of primary jurisdiction).

Based on the relevant statutes and the doctrine of judicial economy it is clear that this matter should proceed as a Petition for Judicial Review. This approach was applied in a nearly identical case brought by Southern California Edison in the First Judicial District. *See* Exhibit 4, Order to Proceed as Petition for Judicial Review, November 19, 2009. The Nevada Supreme Court also endorsed this approach in the *Campbell* case.

## CONCLUSION

NV Energy, by filing an original civil action, is asking this court to preside over the re-litigation of issues that have been the subject of extensive administrative proceedings before the Department and Commission. NV Energy had an adequate legal remedy available through NRS Chapter 233B whereby this court could have reviewed the Decision of the Commission for violations of constitutional or statutory provisions, acting in excess of its authority, unlawful procedure or other error of law. This court could have determined whether the Commission's Decision was clearly erroneous in view of the evidence presented to it or whether the Commission acted in an arbitrary or capricious manner. If NV Energy were unhappy with this court's decision, it would have had the ability to appeal to the Nevada Supreme Court. By failing to file a Petition for Judicial Review within the statutory time limit under NRS 233B.130(2)(c), NV Energy has abandoned its rights to review and allowed the Commission's Decision to become final. Based on the doctrines of administrative res judicata, claim preclusion and issue preclusion, the Department respectfully requests that the court grant its Motion to Dismiss pursuant to NRCP 12(b)(5) and dismiss NV Energy's Complaint with prejudice.

In the alternative the proper nature of the proceeding before this court is an action for

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

judicial review subject to NRS Chapter 233B. There is no statute authorizing a trial de novo. NRS 372.680 requires a final decision by the NTC. Pursuant to NRS 360.245(5) a final decision by the NTC is subject to judicial review. NRS 233B.130(6) provides that the procedures in NRS Chapter 233B are the exclusive means of judicial action in relation to a final decision of an administrative agency such as the NTC. In order to harmonize these statutory provisions and comply with the Nevada Supreme Court's decision in *Campbell*, if this matter is to go forward, it should go forward as a Petition for Judicial Review.

DATED this 19th day of January, 2010.

CATHERINE CORTEZ MASTO
Attorney General

By: _____
GINA C. SESSION
Chief Deputy Attorney General
Nevada State Bar No. 5493
100 N. Carson Street
Carson City, Nevada 89701-4717
Attorneys for Defendants

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

## CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 19th day of January, 2010 I served a copy of the foregoing , by mailing a true copy to the following:

John Bartlett
1201 Stewart St., Suite 130
Carson City, NV 89706

An employee of the Attorney General

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Motion to Dismiss filed in District Court Case **CV09-03554** does not contain the social security number of any person.

CATHERINE CORTEZ MASTO
Attorney General

By: _____
GINA C. SESSION
Chief Deputy Attorney General
Nevada State Bar No. 5493
100 N. Carson Street
Carson City, Nevada 89701-4717

Attorneys for Defendants

# EXHIBIT 1

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

Writer's Direct Dial (775) 684-1222

Fax (775) 887-8788

# MEMORANDUM

DATE: May 7, 1999

TO: Assemblyman Bernie Anderson
Chairman, Assembly Committee on Judiciary

FROM: Norm Azevedo, Sr. Deputy Attorney General

SUBJECT: *Venue Sections of S.B. 362*

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Pursuant to the request of the Executive Director of the Nevada Department of Taxation, I have prepared this memorandum to address your venue inquiries. The sections of S.B. 362 that contain the venue provisions are as follows:

1. Section 13 applicable to Chapter 361 of the NRS (property tax).

2. Section 26 applicable to Chapter 365 of the NRS (cigarette tax).

3. Section 30 applicable to Chapter 366 of the NRS (special fuel tax).

4. Sections 33 and 36 applicable to Chapter 372 of the NRS (sales and use tax).

5. Section 41 applicable to Chapter 374 of the NRS (sales and use tax).

I was previously requested by Senator Ann O'Connell to prepare a memorandum addressing the venue concerns. A copy of my memorandum to Senator O'Connell is enclosed for your review. As you will note in my memorandum, I made reference to NRS 233B.130(2)(b) of which a copy is also enclosed for your review.

For all actions which are subject to the requirements of Chapter 233B of the Nevada Revised Statutes, a taxpayer has the ability to file an action in one of three locations. These locations are: (1) Carson City, (2) the county in which the taxpayer resides, or (3) the county where the agency proceeding occurred. See NRS 233B.130(2)(b). The Nevada Department of Taxation has been governed by this venue provision since its passage in

1965. Historically, only audit deficiencies were subject to the application of Chapter 233B of the Nevada Revised Statutes.

With the exception of Section 13 of S.B. 362, the remaining sections delineated above address the applicable procedures to follow in a claim for refund. Prior to S.B. 362, refund claims had not been subject to the requirements of chapter 233B of the Nevada Revised Statutes. Historically, if a taxpayer filed a claim for refund with the Nevada Department of Taxation, which was denied by the Nevada Department of Taxation, the taxpayer was required to file an action in district court in order to contest this denial. The language of S.B. 362 now changes this procedural route. In the event that S.B. 362 becomes law, a taxpayer whose claim for refund is denied by the Department to Taxation will proceed initially to an administrative hearing officer for an administrative trial. In the event the taxpayer is aggrieved by the decision of the administrative hearing officer, the taxpayer may appeal the hearing officer's decision to the Nevada Tax Commission for an administrative appellate review. In the event a taxpayer is still aggrieved after a Tax Commission decision, the taxpayer may file a petition with a district court in a judicial review proceeding. It is this filing of a petition for judicial review which is the subject of the venue provisions in S.B. 362. Thus, S.B. 362 contemplates a change from past practice where refund claims upon passage of S.B. 362 will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes.

Accordingly, it would be advisable to make the venue provisions of S.B. 362 consistent with NRS 233B.130(2)(b).[1] By having consistent venue provisions for both audit deficiencies as well as claims for refund, it would minimize confusion among taxpayers. To the extent it is the desire to harmonize the venue provisions of S.B. 362 and the venue provisions of NRS 233B.130(2)(b), I would recommend the following language modifications to the designated sections of S.B. 362:

Sec. 13. NRS 361.435 is hereby amended to read as follows:

361.435 Any property owner owning property of like kind in more than one county in the state and desiring to proceed with a suit under the provisions of NRS 361.420 may, where the issues in the cases are substantially the same in all or in some of the counties concerning the assessment of taxes on such property, consolidate any of the suits in one action and bring the action in any court of competent jurisdiction in Carson City ~~[, Nevada.]~~ *or Clark County, in any court of competent jurisdiction*

[1] It may also be advisable to caution the language in NRS 364A.280 to follow NRS 233B.130(2)(b). See Section 73 of S.B. 362.

*in Carson City, in and for the county in which the aggrieved party resides or in and for the county where the agency proceeding occurred.*

Sec. 26. NRS 365.460 is hereby amended to read as follows:

365.460 After payment of any excise tax under protest duly verified, served on the department, and setting forth the grounds of objection to the legality of the excise tax, the dealer paying the excise tax may *file an appeal with the Nevada tax commission pursuant to NRS 360.245. If the dealer is aggrieved by the decision of the commission rendered on appeal, he may* bring an action against the state treasurer in ~~[the district court in and for]~~ *a court of competent jurisdiction in* Carson City *or Clark County* for the recovery of the excise tax so paid under protest *in a court of competent jurisdiction in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred.*

Sec. 30. NRS 366.660 is hereby amended to read as follows:

366.660 1. No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this state or any officer thereof to prevent or enjoin the collection pursuant to this chapter of any excise tax or other amount required to be collected.

2. After payment of any such excise tax or other amount under protest, verified and setting forth the grounds of objection to the legality thereof, filed with the department at the time of payment of the tax or other amount protested, the special fuel supplier, special fuel dealer or special fuel user making the payment may bring an action against the state treasurer in ~~[the district court in and for]~~ *a court of competent jurisdiction in* Carson City *or Clark County* for the recovery of the amount so paid under protest *in a court of competent jurisdiction in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred for the recovery of the amount so paid under protest.*

Sec. 33. NRS 372.680 is hereby amended to read as follows:

372.680 1. Within 90 days after ~~[the mailing of the notice of the department's action]~~ *a final decision* upon a claim filed pursuant to this chapter [,] *is rendered by the Nevada tax commission,* the claimant may bring an action against the department on the grounds set forth in the claim in a court of competent jurisdiction in Carson City *or Clark county* for the

recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

2. Failure to bring *an* action within the time specified constitutes a waiver of any demand against the state on account of alleged overpayments *in a court of competent jurisdiction in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.*

Sec. 36. NRS 372.710 is hereby amended to read as follows:

372.710 The action must be tried in Carson City *or Clark County* unless the court with the consent of the attorney general orders a change of place of trial *the action must be tried in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred unless the court with the consent of the attorney general orders a change of place of trial.*

Sec. 41. NRS 374.685 is hereby amended to read as follows:

374.685 1. Within 90 days after ~~[the mailing of the notice of the department's action]~~ *a final decision* upon a claim filed pursuant to this chapter ~~[,]~~ *is rendered by the Nevada tax commission*, the claimant may bring an action against the department on the grounds set forth in the claim in a court of competent jurisdiction in Carson City *or Clark County* for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed *in a court of competent jurisdiction in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.*

To the extent you need any further information or assistance, you may contact me at 684-1222. I will be out of the office for the remainder of May 7, 1999 and will return first thing Monday morning, May 10, 1999.

Enclosures

NJA:jm

# EXHIBIT 2

SENATE BILL 362: Makes various changes to provisions governing collection and payment of taxes. (BDR 32-219)

Carole A. Vilardo, Lobbyist, Nevada Taxpayers Association, spoke in support of S.B. 362. She said the bill clarified some issues from the original taxpayer bill of rights and the amendments in S.B. 375 of the Sixty-ninth Session.

SENATE BILL 375 OF THE SIXTY-NINTH SESSION: Clarifies authority of Nevada tax commission and makes various other changes concerning taxation. (BDR 32-1050)

Ms. Vilardo said the bill sets up a very specific procedure for determining audit dates, hearings and appeals; claims procedures; a specific procedure on the issue of deficiency determinations or overages; what procedures will be used for refunds. She noted it clarifies two provisions from S.B. 375 of the Sixty-ninth Session. Ms. Vilardo referred to *Proposed Amendments to S.B. 362* (Exhibit I).

Senator O'Connell said the bill allows the filing of a court action in Clark County. She questioned why the two counties (Clark and Carson City) were specified, as opposed to allowing filing in other jurisdictions. Ms. Vilardo said originally all of the filings were in Carson City because the attorney general's office was located in Carson City. She noted the business tax was the first and only time there was a provision made that if a court action was to be filed it could be filed in Clark County, as well as Carson City. She said the attorney general's office would be the best one to answer why it could not be filed in other courts of competent jurisdiction in Nevada. Senator O'Connell said she would like to investigate that question. Ms. Vilardo explained the amendments to the bill and said she had worked with Mr. Pursell, from the Department of Taxation, and Norman J. Azevedo, Deputy Attorney General, Taxation Section, Office of the Attorney General, on the amendments. She said the biggest thing that could be accomplished for the taxpayer and the state was to have a clear, consistent set of rules.

Mr. Pursell referred to *Section by Section Outline of S.B. 362* (Exhibit J). He called attention to page 5, section 7, lines 30-35 of the bill, recommending rather than setting the thresholds in statute, let the Nevada Tax Commission regulate the amount of taxes, penalties and interest that could be considered for a waiver. He said a statement would need to be prepared, to keep on file at the department, with the specifics of the waiver.

Senator Neal asked for an explanation of the words "net deficiency" found on page 6, section 8, line 13 of the bill. Ms. Vilardo gave examples of how this could happen. Senator O'Connell clarified the language said there was a full year to try to balance the situation. Ms. Vilardo said there would be the reporting period and a need to balance out within the 3-year audit period. She concluded by asking for support of the bill.

Senator O'Connell asked why page 29, section 54, lines 20 and 21, specified the effective time of the act was July 1, 1999 at 12:01 a.m. Dino DiCianno, Deputy Executive Director, Department of Taxation said it had to do with the calculation of interest and penalties. Mr. Pursell stated this whole process would help him in his own budget because his revenue officers and auditors had performance indicators, and this would change the focus to education of the taxpayer and making sure the department was consistent when departing information on tax collection.

Senator Neal asked about the phrase "tax extensions." Ms. Vilardo referred to page 1, section 2, lines 10-13, saying the extension had to be caused by the department, not the taxpayer. She said if it was not the fault of the taxpayer, he would not be subject to interest and penalties. Senator Neal said under the doctrine of our law, if it is not stated, it is excluded. He clarified if the tax department audited a company and the needed records for the stated period of time could not be located, application had to be made for an extension. He continued, once an extension was requested, the company cannot be charged for the period of the extension. He noted the language is not clear on this issue. Ms. Vilardo said page 1, section 2, lines 10 - 13 says,

> If, after the audit, the department determines that delinquent taxes are due, interest and penalties may not be imposed for the period of the extension if the taxpayer did not request the extension or was not otherwise the cause of the extension.

After a short discussion, Ms. Vilardo said she would ask legal counsel to meet with Senator Neal to draft some additional wording in this section.

Senator O'Connell asked for clarification of the filing of a court action to any competent court-of-jurisdiction issue from the bill. She suggested removing the language referring to filing of a court action could be only in Carson City or

Clark County. Mr. Azevedo said this particular provision was addressed in NRS chapter 232B and he did not see a problem with it being brought to other courts in the state. He explained the purpose of this bill and what it would achieve. He said the amendments clarified the language with great specificity so that in almost every instance the sequence would be a hearing officer, the tax commission, and, if it went to a court, it would be pursuant to NRS chapter 233B in the form of a petition for judicial review. He said NRS chapter 233B would address most sales- and use-tax statutes that go to the commission. Chairman McGinness asked him to review this section and send an opinion back to the committee. Senator O'Connell asked for a draft of the amendment to be brought back to the committee. Chairman McGinness summarized the amendments proposed by Ms. Vilardo; Senator Neal's concern about the language on page 1, section 2, subsection 3; the clarifying statement on the competency of the court will be reviewed.

Stephanie Tyler, Lobbyist, Nevada Bell, also representing Sprint and AT&T, testified in support of the bill. She said the business community was pleased to see additional clarification. There were protections for the taxpayers and the entities that would be receiving revenues as a result of these actions. She noted the stability of those revenues was important, as was establishing a clear set of rules for the taxpayers with regard to their abilities, rights, and their processes of appeal.

Amy Halley Hill, Lobbyist, Las Vegas Chamber of Commerce, and Barrick Goldstrike Mines Inc., and Retail Association of America, said for the record she supported this legislation.

SENATOR COFFIN MOVED TO DO PASS A.B. 174.

SENATOR O'CONNELL SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS RHOADS, SCHNEIDER AND TOWNSEND WERE ABSENT FOR THE VOTE.)

• • • • •

SENATOR O'CONNELL MOVED TO AMEND AND DO PASS S.B. 362.

SENATOR TOWNSEND SECONDED THE MOTION.

# EXHIBIT 3

# Bill Explanation

## SENATE BILL NO. 362

Assembly Committee on Taxation
Hearing: May 6, 1999

**SUMMARY—Makes various changes to provisions governing collection and payment of taxes. (BDR 32-219)**

**Section 1:** Adds sections 2, 3 and 3.5 of this act to chapter 360 of the NRS.

**Section 2:** Requires the department of taxation to notify a taxpayer concerning the date an audit will be completed.

Allows the department to extend the date that an audit will be completed if it provides a written notice to the taxpayer and an explanation of the reasons for the extension.

Provides, if after completion of an audit and if the department determines that delinquent taxes are due, that it may not impose any penalties or interest during the extension of the audit if the extension was not caused by the taxpayer.

**Section 3:** Provides that written notice be given to a taxpayer if someone affiliated with the department determines that the taxpayer is entitled to an exemption or has been taxed more than required by law.

The notice must be given within 30 days after a determination or, if the determination is a result of an audit, 30 days after completion of the audit. The notice must provide an explanation that the overpayment will be credited against any amount due or instructions on how a taxpayer obtains a refund of the overpayment.

**Section 3.5:** Requires the tax commission to adopt regulations to carry out sections 7 and 10 of this act.

**Section 4:** Clarifies that certain general provisions of the tax laws may be superseded by other provisions of the tax laws.

Clarifies that only parties aggrieved by a decision of the department of taxation may appeal the decision.

Clarifies that the tax commission may review any decision of the department and that the commission may reverse, affirm or modify any decision of the department that a taxpayer appeals or the commission reviews.

Exhibit G P 143
Assembly Committee on Taxation
Date: 5-6-99
Submitted by: TED ZUEND
LCB FISCAL DIV.

26

Requires the commission, when an appeal is heard, to notify the district attorney of each county which may affected by the decision.

**Section 5:** This section amends the taxpayer bill of rights to:

- Clarify that a taxpayer is to be notified in writing when the department of taxation determines that he is entitled to an exemption or has been taxed more than required by law.
- Provide that a taxpayer is entitled to receive written instructions from the department on how to obtain a reduction or release of a bond or other security which he is required to furnish for taxes administered by the department.
- Provide that statutes and regulations are to be construed in favor of the taxpayer if they are of doubtful validity, unless there is a specific statutory provision that is applicable.
- Provide that the provisions of the taxation statutes or regulations administered by the department may not be construed to conflict with this section or applicable regulations.
- Provide that the taxpayer bill of rights applies to all taxation statutes and regulations administered by the department.

**Section 6:** Clarifies that overpaid taxes are to be credited against other taxes before any overpayment is refunded.

**Section 7:** Provides that the department of taxation may waive any tax, penalty or interest in conformity with regulations adopted by the tax commission, if a taxpayer has relied to his detriment on written advice from a representative of the department or an opinion of the attorney general. Requires the department, if it has approved a waiver, to maintain a statement of the reason for the waiver; the amount of tax, penalty and interest owed by the taxpayer; the amount of tax, penalty or interest waived; and the facts and circumstances which led to the waiver.

Provides, upon proof that a taxpayer has in good faith collected or remitted taxes by relying on the written advice from a representative of the department or an opinion of the attorney general or the written results of an audit, that the taxpayer may not be required to pay delinquent taxes, penalties or interest if a subsequent audit determines that the taxes collected were deficient.

**Section 8:** Revises provisions relating to the offsetting of overpayments and underpayments by a taxpayer by:

- Clarifying that the provisions in this section may be superseded by other provisions of the tax laws and that the provisions apply to a reporting period within an audit period.
- Requiring if there is a net deficiency, that a penalty is to be calculated against the net deficiency.
- Requiring, if there is a net deficiency, that interest imposed based on the net deficiency for that period before determining whether there is an overpayment or deficiency for the next reporting period within the audit period.
- Requiring, if there is a net overpayment, the interest that the taxpayer is entitled to receive must be calculated for that period before determining whether there is an overpayment or deficiency for the next reporting period within the audit period.
- Specifying that the provisions of the section do not apply if the taxpayer has not remitted the taxes due in a timely manner.
- Defining "reporting period" to include any reporting period.

**Section 9:** Provides that the prerequisites of action for judicial review of a redetermination must follow a final order of the tax commission, rather than the department of taxation.

Clarifies that any amount to be credited or refunded to a taxpayer, if a court modifies a final order in favor of a taxpayer, is determined by comparing the amount paid to the amount owed, including interest.

**Section 10:** Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in this section. Provides that the amount of any penalty must be based on a graduated schedule which takes into consideration the length of time the tax or fee remained unpaid.

**Section 11:** Provides that an action for collection of delinquent taxes may not be brought when an appeal to the tax commission is pending.

**Section 12:** Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in this section.

**Section 13:** Provides that a taxpayer who wants to consolidate actions to recover property taxes may do so in a court in Clark County as well as Carson City.

**Sections 14 to 15:** Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in these sections.

**Section 16:** Provides that an action for judicial review of a refund claim under the Senior Citizens' Property Tax Assistance Act follows a denial or final action of the tax commission, not the executive director of the department of taxation.

**Section 17:** Provides that the provisions relating to the crediting of overpayments of net proceeds taxes does not prohibit the taxpayer from requesting a refund of the overpayment.

**Section 18:** Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in this section. Clarifies that appeals by a taxpayer over the imposition of penalties and interest are governed by the provisions of NRS 360.245.

**Section 19:** Clarifies that appeals by a taxpayer over the imposition of penalties are governed by the provisions of NRS 360.245.

**Sections 20 to 22:** Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in these sections.

**Section 23:** Provides that an action for judicial review of a claim for refund of business taxes follows a decision of the tax commission, not the department of taxation.

**Section 24:** Provides, if the department of taxation fails to act on a claim for refund of the business tax in a timely manner, that an appeal must be made to the tax commission. Provides that if the taxpayer is aggrieved by the commission's decision he may bring an action against the department within 90 days of the decision.

**Section 25:** Makes it an authorization rather than a requirement that the department of taxation cancel the license of a fuel dealer after a show cause hearing with the dealer.

**Section 26:** Provides that a fuel dealer after paying a tax under protest must appeal the imposition of the tax to the tax commission pursuant to the provisions of NRS 360.245. Provides that if the taxpayer is aggrieved by the commission's decision he may bring an action against the state treasurer in a court in Clark County as well as Carson City.

**Section 27:** Provides that an action for judicial review of a claim to recover fuel taxes paid follows a decision of the tax commission after an appeal.

**Sections 28 to 29:** Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in these sections.

**Section 30:** Provides that a taxpayer who has paid special fuel taxes under protest may file an action to recover the taxes against the state treasurer in a court in Clark County as well as Carson City.

**Section 31:** Requires the department to provide a person receiving a seller's permit a written explanation of the liability of the seller to collect the state sales and use tax including:

- The circumstances under which a service is taxable;
- The procedures for administering exemptions; and
- The circumstances under which freight charges are taxable.

**Section 32:** Provides that NRS 360.320 is an exception to the interest or penalty provisions of this section.

**Section 33:** Provides that an action for judicial review of a claim for refund of sales tax follows a decision of the tax commission, not the department of taxation, and that such action may be brought in a court in Clark County as well as Carson City.

**Section 34:** Provides, if the department of taxation fails to act on a claim for refund of the sales and use tax in a timely manner, that an appeal must be made to a hearing officer within 45 days. Provides that if the taxpayer is aggrieved by the hearing officer's decision he may appeal the decision to the tax commission pursuant to the provisions of NRS 360.245. Provides that if the taxpayer is aggrieved by the commission's decision he may bring an action against the department within 45 days after the decision.

**Sections 35 to 36:** Provides that certain actions relating to erroneous refunds may be brought in a court in Clark County as well as Carson City.

**Section 37:** Clarifies that agents of the department of taxation are bound by the confidentiality provisions of this section.

**Section 38:** Requires the department to provide a person receiving a seller's permit a written explanation of the liability of the seller to collect local sales taxes including:

- The circumstances under which a service is taxable;
- The procedures for administering exemptions; and
- The circumstances under which freight charges are taxable.

# EXHIBIT 4

IAC

CATHERINE CORTEZ MASTO
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100 North Carson Street
Carson City, NV 89701-4717

**IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

**IN AND FOR CARSON CITY**

| | |
|---|---|
| Southern California Edison,<br><br>Plaintiff,<br><br>vs.<br><br>STATE OF NEVADA ex rel. Department of Taxation,<br><br>Defendants. | Case No. 09 OC 00016 1B<br><br>Department No. 1 |

**ORDER TO PROCEED AS PETITION FOR JUDICIAL REVIEW**

This matter was originally before the Court as a motion to dismiss filed by Defendants. As part of the Court's order denying the motion dismiss, the Court directed the parties to meet and confer as to the nature of the proceedings before this Court. After meeting, the parties were unable to agree as to the nature of the proceedings and stipulated to a briefing schedule to brief the issues to the Court. Plaintiff filed a motion that this action be conducted as a trial de novo pursuant to NRS 372.680. The Defendants filed its brief arguing that the action is subject to NRS Chapter 233B and should proceed as a petition for judicial review. Each party filed an answering brief. On October 8, 2009 a hearing was held to determine the proper nature of the proceedings before this Court.

The Court has read and considered the points and authorities and other materials

submitted by Plaintiff and Defendants and considered the arguments of counsel at the hearing. Based on the foregoing, and good cause appearing the Court hereby rules as follows:

1. The proceedings in this case are controlled by NRS 233B.130(6) which states that: "The provisions of this chapter are the exclusive means of judicial review of, or judicial action concerning, a final decision in a contested case involving an agency to which this chapter applies."
2. NRS Chapter 233B applies to all administrative agencies within the state unless exempt. The Department of Taxation ("Department") and the Nevada Tax Commission ("Commission") are not exempt from the provisions of NRS Chapter 233B. NRS 233B.039. All decisions by the Commission are therefore subject to NRS 233B.130(6).
3. The judicial review standards imposed by NRS Chapter 233B apply unless there is a specified exception. NRS 372.680 which states in pertinent part: "Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by the Nevada Tax Commission, the claimant may bring an action against the Department..." does not contain specific language authorizing the Court to conduct a trial de novo.
4. NRS 372.680 is, to some extent, only a venue statute, informing a claimant that has received a denial from the Commission of its claim for refund of sales or use tax where it may file its action to seek a recovery of taxes it has overpaid.
5. Local governments that were parties to the proceedings below filed a petition for judicial review of an earlier decision by the Commission in this matter. The Nevada Supreme Court voided the earlier decision. Uniform standards and uniform application of the law demands that both the local government agencies and the taxpayers be treated the same and supports treating the current action as a petition for judicial review.
6. The Legislature made the following changes to NRS Chapter 233B and NRS

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372.680 indicating that decisions by the Nevada Tax Commission on refund claims are subject to NRS 233B:

1989

The legislature removes language authorizing original actions when a statute authorizes such an action and replaces it with the language in NRS Chapter 233B.130(6) "The provisions of this chapter are the exclusive means of judicial review of, or **judicial action** concerning, **a final decision** in a contested case involving an agency to which this chapter applies." (emphasis added)

1997

The legislature adds the language in NRS 360.245(5) that states "A decision of the Nevada Tax Commission is **a final decision** for the purposes of judicial review." (emphasis added)

1999

Prior to 1999, NRS 372.680 permitted an action for a claim for refund to be filed once a refund claim had been filed with the Department of Taxation without an administrative proceeding. The legislature changed the language and it now reads in pertinent part: "Within 90 days after **a final decision** upon a claim filed pursuant to this chapter is rendered by the **Nevada Tax Commission**, the claimant may bring **an action** against the Department on the grounds set forth in the claim..." (emphasis added). "Thus, [the legislation] contemplates a change from past practice where **refund claims** upon passage of [the legislation] will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes." Memorandum dated May 7, 1999 to Assemblyman Bernie Anderson, Chairman, Assembly Committee on Judiciary from Norm Azevedo, Sr. Deputy Attorney General. (emphasis added)

7. Two cases relied upon by Plaintiff, *State v. Obexer & Sons*, 99 Nev. 233, 660 P.2d 981 (1983) and *Saveway Super Serv. Stations, Inc. v. Cafferata*, 104 Nev. 402, 760 P.2d 127 (1989) were both decided before any of the legislative changes noted

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above. Specifically, the change in 1999 was meant to change the past practice where a taxpayer seeking a refund could go directly to district court after a denial by the Department without a contested case going before the Nevada Tax Commission. *See* Memorandum dated May 7, 1999 to Assemblyman Bernie Anderson, Chairman, Assembly Committee on Judiciary from Norm Azevedo, Sr. Deputy Attorney General.

8. The legislative change made to NRS 372.680 in 1999 ensured that there would be the opportunity for an evidentiary hearing, findings of facts and conclusions of law and the opportunity for review by the Commission prior to a decision becoming final. With the change, the legislature limited the scope of NRS 372.680 and brought it within the umbrella of NRS Chapter 233B.

9. Plaintiff participated in an evidentiary hearing before the Commission. Plaintiff is not entitled to a second evidentiary hearing in district court, but is entitled to judicial review of the Commission's February 27, 2009 decision. *Campbell v. State of Nevada*, 108 Nev. 215, 219, 827 P.2d 833, 836 (1992).

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Therefore, this matter will proceed as a Petition for Judicial Review pursuant to NRS Chapter 233B.

IT IS SO ORDERED.

Dated this 19th day of ~~October~~ November, 2009.

James T. Russell

JAMES T. RUSSELL
District Judge

Submitted by:

CATHERINE CORTEZ MASTO
Attorney General

By: G. C. Session

GINA C. SESSION
Chief Deputy Attorney General
Nevada State Bar No. 5493
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Attorneys for Defendants

Nevada Office of the Attorney General
100 North Carson Street
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IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA DEPARTMENT OF TAXATION,
Petitioner,
vs.
THE SECOND JUDICIAL DISTRICT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE JANET J. BERRY,
Respondents,
and
SIERRA PACIFIC POWER COMPANY AND NEVADA POWER COMPANY, INC., JOINTLY DOING BUSINESS AS NV ENERGY,
Real Parties in Interest.

No. 56740



ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges a district court order determining that a use tax refund matter should proceed in the district court as an independent action subject to de novo review, rather than as a petition for judicial review under the Nevada Administrative Procedure Act, NRS Chapter 233B.[1]

Having reviewed the parties' filings, we conclude that writ relief is warranted. NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981). Recently, in Southern California Edison v. District Court, 127 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. No. 22, May 26, 2011), reh'g pending, we concluded that as the result of several

[1]The Honorable Kristina Pickering, Justice, voluntarily recused herself from consideration of this matter.

amendments over the past several years, "NRS 372.680 now contemplates judicial review, in accordance with NRS Chapter 233B, and a petition for judicial review under those statutes is the sole remedy after a final decision by the [Tax] Commission in regard to a sales and use tax refund matter." Accordingly, here, the district court improperly directed that the matter proceed as an independent action subject to de novo review; instead, the matter should proceed as a petition for judicial review under NRS Chapter 233B.

Consequently, we grant this petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to allow real parties in interest to take any steps necessary to comply with the applicable provisions of NRS Chapter 233B and to thereafter proceed with its review of this matter under that chapter.

It is so ORDERED.

_____, C.J.
Douglas

_____, J.
Saitta

_____, J.
Hardesty

_____, J.
Cherry

_____, J.
Gibbons

_____, J.
Parraguirre

cc: Hon. Janet J. Berry, District Judge
Attorney General/Carson City
John Bartlett, Attorney at Law
Washoe District Court Clerk

# Exhibit E

**BEFORE THE DEPARTMENT OF BUSINESS & INDUSTRY**

**LAS VEGAS, NEVADA**

| | |
|---|---|
| IN THE MATTER OF:<br>FINANCIAL INSTITUTIONS DIVISION,<br>Claimants,<br>v.<br>TITLEMAX OF NEVADA, INC. AND TITLEBUCKS D/B/A TITLEMAX,<br>Respondents. | **PROCEDURAL ORDER** |

This is a contested case between Claimant, the Financial Institutions Division of the Nevada Department of Business & Industry (FID), and Respondent, TitleMax of Nevada, Inc. and TitleBucks d/b/a TitleMax (TitleMax). FID commenced this administrative action under NRS 233B.121 with the issuance of an Administrative Complaint for Disciplinary Action and Notice of Hearing ("Complaint") on October 6, 2015. FID requests the imposition of administrative penalties against TitleMax under NRS 604A.820. This matter is properly before the undersigned Administrative Law Judge pursuant to NRS 233B.122, and it is set to proceed to a hearing on November 5, 2015. On October 27, 2015, this Court held a status check at which counsel for both parties appeared. This Order follows.

Under Nevada law, due process guarantees of fundamental fairness apply in administrative proceedings. Dutchess Business Services, Inc. v. Nevada State Bd. of Pharmacy, 124 Nev. 701, 711, 191 P.3d 1159, 1166 (2008). While "the legal process due in an administrative forum is flexible," certain minimum requirements exist. Minton v. Bd. of Med. Examiners, 110 Nev. 1060, 1082, 881 P.2d 1339, 1354 (1994) (internal quotation omitted), overruled on other grounds by Nassiri v. Chiropractic Physicians' Bd., 130 Nev. Adv. Op. 27, 327 P.3d 487 (2014). Specifically, due process requires

the governmental agency taking action against the licensee to provide the licensee notice of the nature of the proceedings, including both the charges alleged and the factual predicates therefor, such that the licensee may prepare its defense. Dutchess, 124 Nev. at 711-12, 191 P.3d at 1166. The agency must also make available to the licensee documentary evidence and the names of witnesses the agency intends to rely on sufficient to allow the licensee to prepare its defense. Id. at 714-15, 191 P.3d at 1167-68. While the mechanisms for this exchange need not take the form of formal discovery, the agency and licensee must exchange proposed exhibits and witness lists in advance of the hearing. Id.

FID provided TitleMax notice of the charges against it and the factual bases for those charges in the Complaint. However, FID did not specify the penalty it seeks the administrative tribunal to impose on TitleMax other than to cite NRS 604A.820, which contains the full panoply of potential penalties ranging from fines of up to $10,000 per violation to license revocation. Furthermore, the parties have not yet exchanged proposed exhibits or lists of witnesses. Minimum standards of due process require the provision and exchange of this information to avoid unfair surprise and permit TitleMax the opportunity to prepare its defense.

Accordingly, **IT IS HEREBY ORDERED**:

The hearing date of November 5, 2015, is vacated.

The Order for Briefing requiring submission of briefs from the parties by October 29, 2015, is vacated.

FID must provide the following to TitleMax by **November 13, 2015**: identification with specificity of the type and/or amount of penalties it seeks against TitleMax, copies of all proposed exhibits, and a list of proposed witnesses including a brief statement summarizing their expected testimony.

TitleMax must provide the following to FID by **November 30, 2015**: copies of all proposed exhibits and a list of proposed witnesses including a brief statement summarizing their expected testimony.

The parties shall submit a joint evidentiary packet to this Court by **December 18, 2015**, containing the following information:

1. A concise statement of the nature of the action and the contentions of the parties;
2. A statement of all uncontested facts deemed material in the action;
3. A statement of the contested issues of fact in the case as agreed upon by the parties;
4. A statement of the contested issues of law in the case as agreed upon by the parties;
5. Plaintiff's statement of any other issues of fact or law deemed to be material;
6. Defendant's statement of any other issues of fact or law deemed to be material;
7. Lists or schedules of all exhibits that will be offered in evidence by the parties at the trial. Such lists or schedules shall describe the exhibits sufficiently for ready identification and:
   (A) Identify the exhibits the parties agree can be admitted at trial; and,
   (B) List those exhibits to which objection is made and state the grounds therefor. Stipulations as to admissibility, authenticity and/or identification of documents shall be made whenever possible.
8. Lists of the parties' proposed witnesses including a brief statement summarizing their expected testimony.

The parties are also free to submit briefs summarizing their respective legal positions by **December 18, 2015**. No page limit shall apply to these briefs.

This Court shall set a new hearing date upon receipt of the joint evidentiary packet.

Dated this 29th day of October, 2015.

/s/ Denise S. McKay
Denise S. McKay
Administrative Law Judge
State of Nevada

## CERTIFICATE OF MAILING

I, Michelle Metivier, do hereby certify that I deposited in the U.S. mail, postage prepaid, via First Class Mail and Certified Return Receipt Requested, a true and correct copy of the foregoing Procedural Order to the following:

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Joseph G. Went, Esq.
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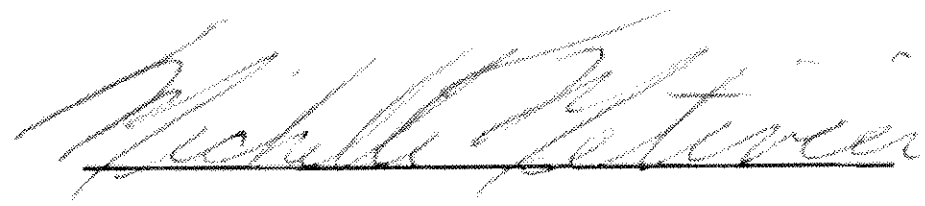
Dated this 29th day of October, 2015.



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*Attorneys for Plaintiff*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| TITLEMAX OF NEVADA, INC., a Nevada corporation,<br><br>Plaintiff,<br><br>vs.<br><br>STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY FINANCIAL INSTITUTIONS DIVISION,<br><br>Defendant. | Case No.: A-15-719176-C<br><br>Dept. No.: XXI<br><br>**PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**<br><br>Hearing Date: December 9, 2015<br><br>Hearing Time: 9:30 a.m. |

Plaintiff TitleMax of Nevada, Inc. dba TitleMax and/or TitleBucks ("TitleMax"), by and through its attorneys of record, the law firm of Holland & Hart LLP, hereby replies in support of TileMax's Motion for Summary Judgment ("Motion") and in response to the Opposition to Motion for Summary Judgment ("Opposition") filed by the State of Nevada, Department of Business and Industry, Financial Institutions Division (the "FID").

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This Reply is made pursuant to Rule 56(a) of the Nevada Rules of Civil Procedure ("NRCP") and Rule 2.20 of the Eighth District Court Rules ("EDCR") and is based on the attached Memorandum of Points and Authorities and supporting documentation, the papers and pleadings on file in this action, and any oral argument this Court may allow.

DATED this 4th day of December, 2015.

Patrick J. Reilly, Esq.
Joseph G. Went, Esq.
HOLLAND & HART LLP
9555 Hillwood Drive, Second Floor
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*Attorneys for Plaintiff*

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

TitleMax is entitled to an interpretation of NRS 604A.210, NRS 604A.445, and NAC 604A.230 from this Court. Despite the FID's attempt to avoid a judicial interpretation by inserting purported issues of disputed fact, this is merely a dispute about interpretation of the aforementioned laws. Thus, after being fully briefed on the contradicting legal interpretations, this Court is able to resolve this litigation in full merely by issuing a ruling interpreting the foregoing laws.

### II. ADMINISTRATIVE EXHAUSTION DOES NOT BAR SUMMARY JUDGMENT.

In the almost identical argument set forth in the FID's Motion to Dismiss, the FID claims that this Court lacks jurisdiction and therefore cannot rule on the statutory interpretation questions set forth in the Motion. This argument is meritless.

As set forth in detail in TitleMax's Opposition to the FID's Motion to Dismiss for Failure to Exhaust for Administrative Remedies,[1] Nevada law is clear—a party is not required to exhaust administrative remedies when it is seeking an interpretation of a law.[2] Here, without question, TitleMax is *only* seeking an interpretation of law. Nevada law is equally clear that the administrative exhaustion doctrine does not apply "when a resort to administrative remedies would be futile."[3] Here, resorting to administrative remedies is futile because the FID's position as to the interpretation of the disputed law is evident.[4] Thus, the Court has jurisdiction and

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[1] TitleMax incorporates its Opposition to the Motion to Dismiss for Failure to Exhaust Administrative Remedies as if fully set forth herein.

[2] *See Malecon Tobacco, LLC v. State ex rel. Dept. of Taxation*, 118 Nev. 837, 839, 59 P.3d 474 (2002) citing *State, Dep't of Taxation v. Scotsman Mfg. Co.*, 109 Nev. 252, 254, 849 P.2d 317, 319 (1993).

[3] *Malecon Tobacco*, 118 Nev. at 839, citing *Karches v. City of Cincinnati*, 526 N.E.2d 1350, 1355-56 (Ohio 1988) (where pursuit of administrative remedies would be futile or unusually onerous, it was unnecessary to exhaust administrative remedies in order to challenge the constitutionality of a zoning ordinance as applied to a specific parcel of property) and *Memorial Hosp. v. Dept. of Rev. & Tax.*, 770 P.2d 223, 226 (Wyo. 1989); *see also State v. Scotsman Mfg. Co.*, 109 Nev. 252, 255, 849 P.2d 317, 319 (1993) ("Neither will the exhaustion doctrine deprive the court of jurisdiction where initiation of administrative proceedings would be futile."); *see also Engelmann v. Westergard*, 98 Nev. 348, 353, 647 P.2d 385, 389 (1982).

[4] Resorting to administrative remedies is "futile" if there is certainty of an adverse decision or the agency has "evidenced a strong position on the issue together with an unwillingness to reconsider." *James v. United States*, 824 F.2d 1132, 1139 (D.C. Cir. 1987); *Randolph-Sheppard Vendors v. Weinberger*, 795 F.2d 90, 105 (D.C. Cir. 1986).

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should rule on the interpretation of NRS 604A.210, NRS 604A.445, and NAC 604A.230.

## III. SUMMARY JUDGMENT SHOULD BE ENTERED IN FAVOR OF TITLEMAX.

### A. There Are No Issues of Fact To Preclude Summary Judgment

In an attempt to prevent summary judgment, the Opposition uses the correct jargon—"genuine issues of fact exist"—yet, there is no substance behind the buzzwords. Besides *dicta* in the headings, there are only ***two*** instances of claimed factual disputes. As discussed *infra*, neither is a factual dispute, but really the issue of the parties competing statutory interpretations.

**First Alleged Genuine Issue of Material Fact**

- "[T]here is a genuine issue of material fact with regard to whether the additional party to the loan is listed on the title."[5]
  - This is not a dispute as to facts. This is encompassed in the actual question before the Court—whether there is no violation of NAC 604A.230(1)(1) when there is a co-borrower on a title loan, *who is not on title of said vehicle.* Thus, to answer this statutory interpretation issue, there is no dispute that the co-borrower is not listed on title.

**Second Alleged Genuine Issue of Material Fact**

- "Though TitleMax agrees that more interest is charged via the Grace Period Payments Deferment Agreement than would be charged via the Grace Period Payments Deferment Agreement than would be charged via the 210 loan, TitleMax does not agree that the amount of the loan is not ratably and fully amortized, does not agree that the loan is extended and does not agree that there is no grace period or that there is no gratuitous deferment. Therefore, there are genuine issues of material fact."[6]
  - The actual question before the Court is whether there is a violation of NRS 604A.210 or NRS 604A.445 when there is the continued accrual of contractual simple interest during a grace period. The FID merely twists its interpretation to claim that these are factual disputes. Yet, these issues are irrelevant if the FID's

[5] Opp. at 14:1-3.

[6] Opp. at 20:12-17.

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interpretation is incorrect.

Indeed, the only affidavit offered by the FID is Exhibit E to its Opposition. Ms. Sekhon's Affidavit serves only two purposes: (1) to authenticate records; and (2) explain the FID's legal position in this matter. How does this create a genuine issue of material fact under NRCP 56? The simple answer is, it does not, for the very reason that the sole purpose of this action for declaratory relief is to obtain interpretations as to Nevada law, and nothing more.

**B. TitleMax is Entitled to Summary Judgment On Its Interpretation of NRS 604A.210 and NRS 604A.445.**

The FID's legal position that a licensee may not charge ***any*** interest whatsoever during a grace period under NRS 604A.445 is wrong. The alleged statute violated, NRS 604A.210, provides:

> The provisions of this chapter do not prohibit a licensee from offering a customer a grace period on the repayment of a loan or an extension of a loan, except that the licensee shall not charge the customer:
>
> 1. Any fees for granting such a grace period; or
>
> 2. Any ***additional fees or additional interest*** on the outstanding loan during such a grace period.[7]

The FID urges this Court to literally rewrite the statute by striking the word "additional" from NRS 604A.210. Yet, this Court cannot rewrite or ignore words in a statute—statutes must be read in a way that would "not render words or phrases superfluous or make provisions nugatory."[8] If the Legislature had intended to ban the accrual of "any" interest during the grace period, it would have either (1) expressly inserted the word "any" into the statute; or (2) not have inserted the word "additional" before "interest."

The FID's position that the prohibition of "additional fees" or "additional interest" means that the total interest on the loan, for the entire period the loan is unpaid, cannot exceed the total interest contracted to be paid within 210 days, is also wrong. Again, this interpretation would require a word to be ignored—the word "additional" would be meaningless. Interpreting a

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[7] NRS 604A.210 (emphasis added).

[8] *Southern Nev. Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173



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statute in a manner in which words are rendered superfluous is contrary to well-settled maxims of statutory construction.[9]

Ignoring the word "additional" is all the more problematic when looking at the legislative history involving NRS 604A.210. Indeed, the FID's Opposition completely ignores the legislative history because that history entirely undermines the FID's position and supports TitleMax's interpretation. In April 2005, Sections 13 and 23 of Assembly Bill ("AB") 384, were re-written and added to what would ultimately become NRS 604A.210. Section 23 originally prohibited a licensee from charging the following during a grace period:

1. Any fees for granting such a grace period; or

2. **Any** fees or interest on the outstanding loan during such a grace period.[10]

The word "any" was dropped from Section 23 and the word "additional" was specifically added after the original bill was drafted. This change alsone is dispositive of this matter—it evidences that the Legislature specifically rejected the FID's current position when it enacted AB 384. According to the United States Supreme Court, "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.'"[11] By rermoving the word "any" and including the word "additional", the Nevada Legislature specifically intended that interest at the same contract rate could continue during the grace period. Thus, summary judgment should be entered finding that the Grace Period Agreement does not violate NRS 604A.210 or NRS 604A.445.

**C. TitleMax is Entitled to Summary Judgment On Its Interpretation of NAC 604A.230(1)(a).**

As set forth in the Motion, an individual may be a co-borrower on a title loan *without* violating NAC 604A.230(1)(a) when said individual is not listed on title of the vehicle associated with said loan. This interpretation is based upon a unambiguous language which must be

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[9] *In re Steven Daniel P.*, 129 Nev. —, 309 P.3d 1041, 1043-44 (2013).

[10] Exhibit 3 to Motion (emphasis added).

[11] *INS v. Cardoza–Fonseca*, 480 U.S. 421, 442 (1987).



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interpreted according to its plain meaning.[12] Indeed, NAC 604A.230(1)(a) provides that a licensee "shall not…[r]equire or accept a ***guarantor*** to a transaction entered into with a customer." By its very language, it is clear that NAC 604A.230 ***only*** prohibits "a guarantor" from guaranteeing a title loan. A co-borrower, as a matter of law, is not a guarantor.[13] Thus, the existence of a co-borrower cannot be a violation of NAC 604A.230.

Based upon the clarity on this issue, the Opposition not only completely ignores the actual language of NAC 604A.230, but retreats from its earlier position that a co-borrower could violate NAC 604A.230(1)(a). Indeed, the FID claims now claims that a co-borrower who is not listed on a vehicle's title is "either violating NRS 604A.105 and NRS 604A.115, or it must be violating NAC 604A.230."[14] This change in position is telling. Very simply, the FID does not approve of the existence of a co-borrower on a title loan when the co-borrower is not on title, but there is no actual legal prohibition.

Significantly, **NAC 604A.230 is a regulation promulgated by the FID**. It is the FID's own plain language with which it now seems to take issue. And, even more significantly, the FID has the power to change NAC 604A.230 at any time. Indeed, it would be relatively simple for the FID to amend this regulation so it comports with its current position. Yet, the FID has not even suggested any follow up rulemaking for NAC 604A.230.

Critically, the newly claimed violations—NRS 604A.105 and NRS 604A.115—are just statutory definitions.[15] Thus, it is difficult to comprehend how a licensee could "violate" a legal definition.

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[12] *See, e.g., We The People Nev. ex rel. Angle v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1170 (2008) (explaining that this court interprets unambiguous language "in accordance with its plain meaning"); *State Dep't of Ins. v. Humana Health, Ins.*, 112 Nev. 356, 360 (1999).

[13] A co-borrower and a guarantor is a co-borrower is a principal obligor while a guarantor is a secondary obligor. See, e.g., RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 15. A co-borrower is primarily liable on the loan and whether his or her fellow debtor defaults or has defenses is not pertinent to his or her obligation to repay. A guarantor, on the other hand, is not liable at all, unless the principal obligor defaults. Indeed, to collect on a guaranty, a lender would have to prove the default by the underlying borrower, which, of course, is not the case with the co-borrower arrangement. See, e.g., RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 22.

[14] Opp. at 14:5-8.

[15] NRS 604A.010 provides "[a] used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 604A.015 to 604A.125, inclusive, have the meanings ascribed to them in those sections."





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Still, in its retreat, the FID is now misinterpreting other statutes. The FID claims that only owners of vehicles can only be borrowers on title loans.. This is not accurate. To make this claim, the FID focuses on just five words of NRS 604A.105, which defined title loans, and purposefully ignores the rest of the statute. NRS 604A.105 provides:

> 1. "Title loan" means a loan made to a customer pursuant to a loan agreement which, under its original terms:
>
> (a) Charges an annual percentage rate of more than 35 percent; and
>
> (b) Requires the customer to secure the loan by either:
>
> (1) Giving possession of the title to a vehicle legally owned by the customer to the licensee or any agent, affiliate or subsidiary of the licensee; or
>
> (2) Perfecting a security interest in the vehicle by having the name of the licensee or any agent, affiliate or subsidiary of the licensee noted on the title as a lienholder.
>
> 2. The term does not include a loan which creates a purchase-money security interest in a vehicle or the refinancing of any such loan.[16]

The portion relied upon by the FID, NRS 604A.105(1)(b)(1), merely discusses how to secure the loan. However, the FID ignores NRS 604A.105(1)(b)(2), which is an alternative to subsection (b)(1) and *does not require that the customer legally own the vehicle*. Indeed, the other option to secure the vehicle, NRS 604A.105(1)(b)(2), has no mention of requiring the customer to be on the title. Also, in the statutory definition of vehicle, Nevada law does not include any requirement that the vehicle be owned by the borrower.[17]

Very simply, as a matter of law, there cannot be a violation of NAC 604A.230(1)(a) based upon the mere existence of a co-borrower, which is fatal to the FID's interpretation of the regulation. Thus, Court should grant summary judgment in favor of TitleMax and find that a co-borrower on a title loan that is not on title does not violate NAC 604A.230(1)(a), or the definitional statutes of NRS 604A.105 and NRS 604A.115.

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[16] NRS 604A.105.

[17] NRS 604A.125.



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## IV. CONCLUSION

Summary judgment should be granted in favor of TitleMax and the Court should declare that: (i) an individual may be a co-borrower on a title loan without violating NAC 604A.230(1)(a) when said individual is not listed on title of the vehicle associated with said loan; and (ii) interest may be charged during a grace period at the originally contracted rate under NRS 604A.210 and NRS 604A.445.

DATED this 4th day of December, 2015.

Patrick J. Reilly, Esq.
Joseph G. Went, Esq.
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*Attorneys for Plaintiff*

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 14th day of October, 2015, a true and correct copy of the foregoing **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** was served by the following method(s):

☒ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

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*Attorneys for Defendant*

☒ U.S. Mail: by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

Denise S. McKay, Esq.
Administrative Law Judge
Nevada Division of Business & Industry
555 E. Washington Avenue, Suite 4900
Las Vegas, Nevada 89101

☒ Email: by electronically delivering a copy via email to the following e-mail address:

Denise S. McKay, Esq.
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☐ Facsimile: by faxing a copy to the following numbers referenced below:

An Employee of Holland & Hart LLP



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*Attorneys for Plaintiff*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| TITLEMAX OF NEVADA, INC., a Nevada corporation,<br><br>Plaintiff,<br><br>vs.<br><br>STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY FINANCIAL INSTITUTIONS DIVISION,<br><br>Defendant. | Case No.: A-15-719176-C<br><br>Dept. No.: XXI<br><br>**AMENDED CERTIFICATE OF SERVICE** |

I hereby certify that on the 4th day of December, 2015, a true and correct copy of the foregoing **PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** was served by the following method(s):

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☒ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

Adam Paul Laxalt
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*Attorneys for Defendant*

☒ U.S. Mail: by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

Denise S. McKay, Esq.
Administrative Law Judge
Nevada Division of Business & Industry
555 E. Washington Avenue, Suite 4900
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An Employee of Holland & Hart LLP

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**RTRAN**

**CLERK OF THE COURT**

DISTRICT COURT
CLARK COUNTY, NEVADA

| | |
|---|---|
| TITLEMAX OF NEVADA, INC., a Nevada corporation,<br><br>Plaintiff(s),<br><br>vs.<br><br>STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY FINANCIAL INSTITUTIONS DIVISION,<br><br>Defendant(s). | CASE NO. A719176<br><br>DEPT. NO. XXI |

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

WEDNESDAY, DECEMBER 9, 2015

**RECORDER'S TRANSCRIPT RE:**
**NEVADA FINANCIAL INSTITUTIONS DIVISION'S MOTION TO DISMISS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES;**
**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

APPEARANCES:

For the Plaintiff: PATRICK J. REILLY, ESQ.

For the Defendant: DAVID J. POPE, ESQ.

RECORDED BY: SUSAN SCHOFIELD, COURT RECORDER

LAS VEGAS, NEVADA, WEDNESDAY, DECEMBER 9, 2015, 9:57 A.M.

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THE COURT: Case Number A719716, TitleMax of Nevada versus Nevada Department of Business and Industry.

You're representing TitleMax?

MR. REILLY: Good Morning, Your Honor. Yes, Pat Reilly on behalf of TitleMax.

MR. POPE: Good Morning, Your Honor.

THE COURT: What's the jingle? I can hear the tune but I can't remember the words. Title back with TitleMax?

MR. REILLY: Get your title back from TitleMax, I think.

THE COURT: Is that what it is? Title back with TitleMax?

MR. REILLY: We talked about this last time.

THE COURT: I know because it's a great jingle.

MR. REILLY: It is catchy.

THE COURT: I mean that's the point of a good jingle that you remember it right away.

MR. REILLY: Yes, that's true.

THE COURT: All right. Good Morning.

MR. POPE: Good morning, Your Honor. David Pope on behalf of the Financial Institutions Division. I'm with the Attorney General's office, and with me is Commissioner Burns from the FID and Harvine Sekhon with the FID.

THE COURT: Can you spell that second name?

MR. POPE: Harvine, is it S-E-K-H-O-N?

MS. SEKHON: Yes.

MR. POPE: Yes. Thank you.

THE COURT: You got that, Susie?

COURT RECORDER: Yes.

THE COURT: All right. It's for the benefit of our staff who I know wouldn't be able to -- if I can't spell it, I assume they can't spell it, so. Maybe that's a faulty assumption, but --

I have a bunch of questions actually, starting with the -- you can sit down for this one -- starting with the Deputy Attorney General. And my question is -- I mean obviously the threshold issue is whether or not there are questions of law that the Court can answer, or whether or not they have to have a final administrative determination and then bring it on a petition for judicial review.

So my question to you is this: What are the factual disputes in this case?

MR. POPE: Okay, Your Honor. That is one --

THE COURT: Like what is there that's disputed factually that somebody has to resolve before we can get to the bottom line here?

MR. POPE: Well with regard to the first issue that was raised, the additional persons on the loans, the statutes require that the person who obtains the loan is the legal owner.

THE COURT: Right.

MR. POPE: And that can be established by either showing that you have the title and it's in your name and you can turn it over, or that you have the title and have the ability to put a security interest on it.

THE COURT: Right. So let me ask you this: Aren't they conceding that these co-borrowers don't have title to the car? Isn't that conceded by them?

MR. POPE: Well to back up, the initial question that we have is I don't think FID has agreed or can agree that there are co-borrowers because FID doesn't really know what these additional persons are.

THE COURT: Right, and we talked about that last time. I said well --

MR. POPE: Yeah.

THE COURT: -- you call a duck a goose, but it's still a duck.

MR. POPE: Right.

THE COURT: Just like you can call a guarantor a co-borrower, and I grilled opposing counsel last time and I said tell me what's the difference between a co-borrower and a guarantor.

So my question, I guess, to you is if they agree that a co-borrower doesn't have title to the car, and I think that they stipulated to that. They're saying well a co-borrower is principally liable and that's the difference, wherein a guarantor is secondarily liable; they're only responsible after the primary borrower, and these two are standing in equal position. So I guess if they acknowledge all that, what factual issue is left?

MR. POPE: The factual issue that's left is that there's no indication of what the co-borrowers -- or why they're there. So if you remove co-borrower and say that these additional persons are not the legal owners, I think the answer -- or the question can be answered. But I don't think that we can agree to these additional persons being co-borrowers because we don't know why they're there.

THE COURT: Right. But I mean is, if the question of law is in order to be a borrower or be responsible you have to be a titleholder, then can't I say yes you have to be a titleholder, or no you can't --

MR. POPE: I think -- I think you could --

THE COURT: -- you don't, regardless of what you call them, and isn't that more a question of law? So I guess my question to you is so what facts are disputed? Because to me that's a question of law. I mean a co-borrower -- you can call it whatever you want -- and the issue is, is that a guarantor or not a guarantor?

I mean, so I guess what facts need to be flushed out on that issue?

MR. POPE: Well I think if you jump to that next question of whether they're a guarantor or not a guarantor you have to have facts to determine why they're included on the loan. Why are they there? Why was it necessary for that name to be on the loan? And those facts were never provided.

So if you want to say that they're just an additional person, and they're not a legal owner, and the law doesn't allow for that, I think you can answer that question. But when we get into calling him a co-borrower or a guarantor it's premature because I don't think those facts exist.

THE COURT: Okay.

MR. POPE: I mean they haven't been provided.

THE COURT: Because I thought they were stipulating that they're not a titleholder. So if the Attorney General's position is, or the Division's position is, hey, you either have to be a titleholder or you can't be -- you can't have an obligation on the loan, then I can answer that question. If the Division's position is well there may be situations where you can be a co-borrower then, yeah, there's questions of fact.

I mean my understanding was the Division's position is you have to be a titleholder or you can't be responsible on the loan. Now if that's not correct then maybe there's questions.

MR. POPE: I think that there are -- well to answer one of your questions, I think that there could be situations. I mean there could be two people who are legal

owners of a vehicle, but where's the proof to show that, you know?

THE COURT: Right. But I don't think that they're saying that. I think they're acknowledging that in some situations --

MR. POPE: I think they acknowledge in a tricky way, Your Honor, because --

THE COURT: -- that in some situations what they've got are people coming in and saying I'm the owner and, you know, my neighbor, my friend, my cousin, my dad, whatever, is going to be a co-borrower with me, and that person isn't on the loan. I mean isn't on the -- I misspoke -- isn't on the vehicle title, isn't an owner of the vehicle.

My second question I guess, if I choose to or I determine that I can decide this as a question of law, my getting -- cutting to the chase, do you know what the point of that is? The point of the statute that prohibits a guarantor in these situations. Like what's the consumer protection aspect to that, do you know? What's the policy behind it?

MR. POPE: The whole purpose of Chapter 604A is to make loans that are affordable, that can be repaid, and to the extent that you require a guarantor you're kind of conceding that you haven't made a loan that that borrower has an ability to repay.

THE COURT: Okay. So the consumer protection aspect would be if somebody can't qualify for the loan based on their own credit and their own vehicle title, then they shouldn't be obtaining the loan.

MR. POPE: Right.

THE COURT: Okay. Okay, so those were -- that was my --

MR. POPE: But, Your Honor, I also have to address the factual issues with regard to the --

THE COURT: Right. I was going to get there.

The factual issues on the other question which was about whether additional interest means interest of the same rate accruing during the grace period, or additional interest means you get a loan at 7% and I'm going to give you a grace period, so now you have to pay 10%, or 8%, or some higher interest rate. That's the second question, correct?

MR. POPE: Yeah, well --

THE COURT: So what's the factual dispute there?

MR. POPE: The second question is kind of all-encompassing with regard to these grace period payment deferment agreements.

THE COURT: Right.

MR. POPE: You know, the statute requires that they provide for installment payments, that they ratably and fully amortize the amount of the loan, both the principal and the interest, and that they don't extend the loan. And none of those statutory requirements are met, and when we get onto the next -- into the motion for summary judgment, I mean the case law establishes what the requirements are for genuine issues of material fact.

And, you know, there's a dispute as to whether these are installment payments, and installment payments are equal payments. And so if we're disputing based on the facts that are provided, if we're disputing that these are installment payments, there must be additional facts that we haven't seen, because how could it be an installment payment?

The same goes with ratably and fully amortizing. It's supposed to be --

THE COURT: So it -- I'm sorry to cut you off. Is the question you're not sure what they're charging on these loans? Because my understanding was everybody's

in agreement that they're giving people grace periods. And let's just say the consumer, the customer, whatever, the borrower, obtained the loan -- I'm just going to use an easy rate, 10%, okay? And I think TitleMax is saying we give them a grace period but we continue to charge them 10% interest during the 120-day grace period.

And what the Division is saying, no, you can't have any interest charged during the grace period, and they're, TitleMax, is saying no what it means is additional means we can't raise the interest rate, so we can't say 10% plus 3% for getting the extra grace period meaning they can't raise the interest rate.

So isn't that a question of statutory interpretation whether or not they can raise the interest rate or not raise the interest rate, or whether they can charge anything; that the idea of the grace period is a grace period. Like these are people who can barely afford to pay, so we don't want them to pay anything.

MR. POPE: Right, Your Honor. A grace period is statutorily defined as a period of deferment offered gratuitously. And in this case it's not because this is supposed to be a closed-end loan. There's -- you're supposed to get 210 days of interest and there's supposed to be principal and interest in each payment, and if you offer a grace period then there's nothing collected. And if you start up again then you continue on with your 210 days, right?

And so it doesn't -- I mean how can they make the argument? I see what you're saying but I think it's a -- it's a mixed --

THE COURT: No but I'm saying what's the question of fact?

MR. POPE: Yeah, it's a mixed question of law and fact. I mean --

THE COURT: What's the fact if they're not talking about particular loans here, they're just talking about as a matter of policy whether or not they're allowed to

charge interest during the grace period.

So my question is what's the question of fact that somebody needs to answer? What's the fact question? If everybody says we're charging interest during the grace period, what's the question of fact that we need to answer first? I mean isn't the question can they charge interest during the grace period?

MR. POPE: That's one of the questions, yes.

THE COURT: And that's to me a question of law under the statute. So what's the question of fact I guess my question would be to you?

MR. POPE: The question of fact is whether it's additional interest. They're saying they can charge interest, that it's --

THE COURT: Yeah, but that's not really a question of fact. To me that's a question of law whether or not that means additional interest or doesn't mean additional interest.

MR. POPE: I think it's a mixed question of law and fact. I think the way the FID --

THE COURT: 'Cause what's -- I guess my issue is what's disputed? If all of the facts of what they're doing are agreed to, I don't think TitleMax is coming in here and saying oh Division, you're making stuff up, we're not doing these things. I think they're saying we're doing these things, we just think we're allowed to do them. Right? That's what TitleMax is saying.

You're not saying we're not doing any of these things, you're saying okay we are doing these things but we're allowed to do them.

MR. REILLY: Correct. Grace periods are offered and they do occur. The question is --

THE COURT: Yeah, I mean I can see just if I am going to answer these as

questions of law, to me the public policy or the consumer protection aspect is you don't want to get people on this roller -- or having to pay huge interest for, you know, like additional extra interest on these loans. That's why you have it for a fixed period. But if you're allowed to give a grace period, then aren't you just allowing making them pay more and more money in interest if the point of the statute is that they only should be paying a certain amount, if you give them a grace period it's above the amount, right? I mean isn't that the public policy behind the statute?

MR. REILLY: Well that's the argument for interpreting the statute, but that's a question of law. That's exactly where we're at.

THE COURT: Right. I mean I think that's a question of law. I'm just saying I think that way is in favor of the Division's interpretation.

I mean look, if, you know, looking to interpret the statutes, what's the point of them? I like to look to what's the policy; what's the consumer protection policy that the legislature was trying to implement here?

MR. POPE: Well that's a good question, Your Honor. And the FID has exclusive original jurisdiction and should be allowed to opine on these statutes first. They have a case pending, it's a statutorily authorized hearing, it's an adequate remedy, it's going to provide for the relief that TitleMax is seeking because that administrative decision would be reviewed by the district court when it's brought here pursuant to 233B.

So they're just getting ahead of the process and it really renders meaningless the regulatory scheme if FID cannot opine on this, and the administrative hearing can occur.

THE COURT: Well let me ask this then to you. Well even if we say, okay, the facts aren't in dispute and it's really a question of law, under the regulatory scheme

isn't the point to give the Division that has expertise in this the opportunity to opine on all of this before the district court weighs in? Isn't that kind of part of the statutory scheme, too, that they, based on their expertise, should be opining first and then we look at it and say yes or no, or --

MR. REILLY: There's a major problem with that argument because if the Division is going to do that, it has to comply with NRS Chapter 233B, the Administrative Procedure Act, because when it's interpreting a statute it needs to follow the regulatory process to do that.

My problem with this entire matter is that there is -- what's happening is rule making by enforcement. What the Division does is it says it takes an aggressive interpretation, or you can say maybe not an aggressive interpretation, but it says we interpret the law this way. TitleMax, you must comply. And we say well wait a minute, we disagree with you. We have a good faith disagreement over the statute, and by the way you're telling us to voluntarily stand down and operate at a competitive disadvantage to other licensees. And they get to do that because --

THE COURT: So, well wait. Are other licensees doing the same thing you're doing?

MR. REILLY: Yes.

MR. POPE: Not to FID's knowledge, Your Honor.

THE COURT: Okay, so you're arguing then something totally different which is selective enforcement.

MR. REILLY: Well and but also failure to follow Chapter 233B. You asked me isn't this the proper way to go about doing it, and my answer is no, partly because of Chapter 233B, but also what *Malecon Tobacco* says and *NAS* and *Check City* say which is where you're just seeking an interpretation of the law,

you're entitled to an interpretation of the law. You don't have to go through the administrative procedure to do that.

And if the Court has the First Amended Complaint in front of you, it's Exhibit 1 to our opposition brief, you can look through it, and I direct you to it, paragraphs 5 through 21 are the factual allegations, and all they are, all they do is set up the controversy, the dispute between the parties, which is what I'm required to do to allege declaratory relief claim. There has to be a controversy that exists between the parties.

MR. POPE: Which case law says there isn't --

MR. REILLY: Other than -- excuse me, sir --

MR. POPE: Because it's nonjusticiable at this point in time. I'm sorry --

THE COURT: Well he's making his argument so -- I mean, that's the first question whether or not this is something like in the other cases.

You know, unfortunately in some of the other cases, the Supreme Court didn't really address why they were properly before the District Court. It was just kind of like, okay, the judge granted summary judgment, the judge was wrong, but --

MR. REILLY: Judge, I litigated two of those cases. I mean I litigated the *NAS* and the *Check City* case against the Financial Institutions Division.

THE COURT: Right. Well --

MR. REILLY: But to get --

THE COURT: -- you know, they just --

MR. REILLY: -- to get back to the pleadings --

THE COURT: -- kind of say they made this argument and --

MR. REILLY: I mean are we really going to go for three, you know, third time's the charm?

THE COURT: Right, well I'm just saying the Supreme Court said they made this argument and then they just move on to the merits.

MR. REILLY: Right. In the --

THE COURT: So they really analyze, you know, in that case --

MR. REILLY: Well but -- because they've analyzed it. They've analyzed it several times now.

In the pleading though, in paragraphs 5 through 21, I would submit to the Court that other than the word incorrect that I've got in there a few times before conclusions of law, I don't think that there's anything in there that the FID would dispute factually.

Yes, they issued reports of examination. Yes, we have a dispute over the legal conclusions that gave rise to the ratings. If you go to the first claim for relief, all I say, I allege, a true and ripe controversy exists over the interpretation of these rules which led to the FID's conclusion that TitleMax violated said statutes and regulations.

Then the next page, paragraph 24, TitleMax seeks a declaration that an individual may be a co-borrower on a title loan without violating NAC 6A -- 604A.230. TitleMax seeks declaration interpreting these two statutes as referenced herein.

You go to the prayer for relief, I'm not seeking to set aside the ROE's, although I could actually because there is no administrative procedure for setting aside findings in an ROE, but all we're asking for is declaratory relief and interpretation of the law.

So, and believe me, I understand that this is a be-careful-what-you-wish-for argument because you've already indicated --

THE COURT: Well and the motion for --

MR. REILLY: -- your feelings at least as to the regulation.

THE COURT: Well on the co-borrower or guarantor thing, when you were here before I kept saying, you know, tell me what's the difference between a co-borrower and a guarantor and how you get around the consumer protection aspect of the statute by calling the person a co-borrower. So on that one that's the crux of it.

MR. REILLY: And I understand that. But the purpose of this argument, and I'm still just sticking to administrative --

THE COURT: Right.

MR. REILLY: -- remedies. The purpose of all this is that my client is a licensee and it shouldn't be subjected to substantial enforcement based on a -- over a disagreement of the law. That's why we've come to this court, and I think it's telling that after the lawsuit was filed, an administrative proceeding was filed, and much of Mr. Pope described are things that are going to be addressed in the administrative proceeding.

But that's not what we've asked you to decide. What we've asked you to decide is just to interpret these rules. That's it.

THE COURT: Okay.

MR. POPE: Your Honor, I have three things please.

THE COURT: Sure.

MR. POPE: Okay. With regard to *Check City*, the relevant footnote says that the situation may result in irreparable harm. There -- it wasn't a definite conclusion.

With regard to the comments having to do with reg making, agency --

THE COURT: With what?

MR. POPE: With regulation making --

THE COURT: Oh.

MR. POPE: -- and interpretation of statutes by an agency, an agency is granted authority to interpret statutes when a reg is needed.

THE COURT: Yeah, no, I'm -- I don't quibble with that at all. I mean the agency has to make a determination as to what the statutes mean in order to enforce them.

MR. POPE: Yeah.

THE COURT: Now if there's selective enforcement going on, there could be an issue with that. I had an issue on that in a totally unrelated case. If there's a genuine question on the legality of their interpretation of the law, sometimes you might have selective enforcement just to get it up to the District Court and the Supreme Court to see if their interpretation's correct. So under limited circumstances, selective enforcement can be okay as long as it's not based on discrimination or, you know, some fairly improper.

So the fact that they interpret the statute and enforce it, that's totally fine; that's their job to do that. So I'm -- I don't find any problem there.

On this whole selective enforcement or idea, at this point I don't have any evidence that that's occurred here, so.

MR. REILLY: Not really part of the motion.

THE COURT: Right. I mean, you know, it was mentioned. I don't know if it's occurred or not occurred, so I'm going to kind of put that aside.

But I don't find anything inappropriate in them interpreting the statute and seeking to enforce it according to their interpretation.

MR. POPE: Provided it's a plain language, we don't need a regulation and

we've argued why we think it's the plain language.

THE COURT: Right.

MR. POPE: And then, Your Honor, with regard to facts. I mean the agency is authorized to determine fines, and the administrative law judge would determine the amount of fines, and there's fact finding that's done and discretion that's used in determining the amount of -- and we're glossing over that, but that's not being discussed.

THE COURT: Well clearly they're not asking this Court to do anything like that. The only issue -- I mean to me the two questions of law are this, and I think it's pretty clearly articulated, but I'm going to articulate it now -- whether or not a co-borrower who does not have title to the vehicle is in fact a guarantor.

And the second question is whether or not during a grace period the lender can charge interest at the agreed-upon rate or whether or not they can't charge any interest during that period.

Those -- I mean I think I've put that out pretty plainly. Those are the two questions of law. Whether additional interest means interest at the agreed-upon rate or it means interest at a higher than agreed-upon rate to get the grace period. That's the question of what additional means.

MR. POPE: Your Honor, I have to clarify that. I mean our argument is that --

THE COURT: Yeah, I get it. Your argument is that it means any interest during the grace period -- they can't charge any interest during the grace period.

MR. POPE: Right. Because the full amount of the loan, the principal and the interest, is supposed to be fully -- ratably and fully amortized, right? And so additional -- there is supposed to be interest on an ever-decreasing principal. And here the principal doesn't decrease at all for the first seven periods, and so --

THE COURT: I'm not saying you're not right on the law --

MR. POPE: -- that's the additional interest. Okay.

THE COURT: -- I'm saying those are the questions of law. I'm not saying you're wrong. I mean I'm kind of inclined to agree with the Division actually.

I'm saying -- you know, look, if I say this is a question of law, I have to articulate what's the question of law. Those are the two questions. What is additional mean? And what does guarantor mean? Those are the questions. Is a guarantor a co-borrower, and what does additional mean? That's it. Those are the questions of statutory construction in my opinion.

And I'll just hear on the merits from you.

MR. REILLY: Sure.

THE COURT: I mean we heard -- I mean, again, it boils down to how is a co-borrower different, and why does that get around the consumer protection aspect of the statute?

MR. REILLY: Well I think that --

THE COURT: Because again, these are consumer protection statutes.

MR. REILLY: I understand that but the --

THE COURT: So how is your version, TitleMax's version, protecting the consumer better or more than the guarantor version?

MR. REILLY: I understand. I understand exactly what you're saying. I would caution --

THE COURT: Right. Because again, you know, we have to look at what is the point of these statutes, and they're clearly consumer protection statutes.

MR. REILLY: And I just caution the Court against allowing the consumer protection dog to wag the tail --

THE COURT: Okay.

MR. REILLY: -- on this because our starting point really is the --

THE COURT: Plain language.

MR. REILLY: -- plain language of the rule.

THE COURT: Right. But I -- as I said before, you can't get around plain language. You know, if it's a duck and you call it a du-que, it's still a duck. And so, you know, you can't call it something else if in fact it's the same thing.

MR. REILLY: I like that one. I may quote you in another matter on that at some point.

THE COURT: Well as long as you give me credit.

MR. REILLY: I will. I will.

THE COURT: I told my law clerk under no circumstances is she to give me a refill of coffee and now I need a refill. (laughing)

MR. REILLY: With regard to the regulation, the one thing that I will say is, you know, we rely on the language; we rely on the plain language because we are ultimately tasked with compliance, and if we don't comply we may wind up in an administrative proceeding where the Division is seeking fines of $10,000 per violation. So we rely on the plain language. It's very important.

This is also a regulation, also important to remember. So because it's a regulation, this was written by the FID. This is their language; these are their words. What's equally important is that they can change those words at any time. They don't need to wait until 2017 to go up to the Legislature and go through committee and get, you know, get passage and seek a signature from Governor Sandoval. They can rewrite this regulation at any point in time. They haven't done that.

Frankly, I don't think my client would oppose an attempt by the Division

to rewrite the regulation, but the point of the matter is this is what the regulation says right now. And it says, simply, a licensee shall not require, and I don't think there's a contention that we require, but a licensee shall not accept a guarantor to a transaction entered into with a consumer, and guarantor is a long-standing term of art under the law as to what it is, and it's distinct from a co-borrower.

So the Court's already talked about this, and I think that the inclination of the Court --

THE COURT: No, I think I may have found a question of fact here. And the question of fact is, well, maybe we have to look at how are these loans being enforced against the co-borrowers to answer the question of whether or not they're really de facto guarantors. So maybe that is a question of fact that the Division needs to answer because as I'm sitting here listening to this I'm thinking, well, I would want to know how are you enforcing these? Are you enforcing these as real co-borrowers or are you enforcing these as these are the guarantors.

So maybe that is our question of fact that the Division needs to address --

MR. REILLY: Well --

THE COURT: -- because I want to know that --

MR. REILLY: Well the question -- sorry --

THE COURT: -- because to decide whether or not it's a guarantor, to me then you're right. It gets down to when I say enforcement, who's paying the bill? You know, is it -- are they paying the bill as a principal, an original borrower, or are they paying the bill as a guarantor, meaning you go after them when there's been a default on the loan?

MR. REILLY: And I would submit to the Court that we're merely asking the

question of may the licensee do that under the law?

THE COURT: But see --

MR. REILLY: I would -- well, let me --

THE COURT: -- maybe I answered my own question as to a question of fact because I don't know. I don't know, because then it does depend on how are you treating -- maybe it depends on how are you treating these co-borrowers? Are you really treating them as de facto guarantors?

MR. REILLY: I don't know the exact answer to that. I don't --

THE COURT: And neither do I --

MR. REILLY: Yeah.

THE COURT: -- and maybe that is something the Division has to flush out before they present it to the Court.

MR. REILLY: I don't believe that --

THE COURT: Maybe they do need to flush it out because to me your argument is better -- what your argument is is, no, it's a principal obligor, it's not a guarantor, right? That's your argument.

MR. REILLY: Right.

THE COURT: And so then the question is well factually, okay, maybe that doesn't make a difference. If it doesn't make a difference then I can say it doesn't -- who cares, you know? I can decide it, but if somehow that might make a difference then I need to know those facts. And then if I need to know those facts, then that's something the Division has to tell me because I don't know. Like maybe you are calling them co-borrowers but you're really treating them as obligors -- I mean, as guarantors.

MR. REILLY: Understood. I don't know the answer to, factually, as to

whether TitleMax is suing co-borrowers; I don't believe it is. I'm pretty sure it doesn't but you put me on the spot a little bit on that one.

THE COURT: And, I don't know, 'cause maybe now we do have a question of fact on that, and if we do then it has to go back to the Division.

The only way it's relevant is if I say oh no, a co-borrower is different. But if I -- but, you know, I guess it's your burden to show that they are different, and so I guess maybe factually we do need to know. How are you treating these people? How are you treating them, the same or are you treating them like a guarantor? So maybe that is our question of fact.

MR. REILLY: My only question for the Court is may, under this regulation, a licensee accept a co-borrower who is not on title to the vehicle? That's --

THE COURT: That would be the only question of law.

MR. REILLY: That's the limitation to the question. That's all that we're asking for the Court to answer.

THE COURT: Right. So they would still in terms of if TitleMax is violating that it could still violate that if they're treating the co-borrower as a guarantor. Do you see what I'm saying? I mean on all of --

MR. REILLY: That's their argument but that's again based on interpretation of the regulation that a -- their interpretation of the regulation is that a co-borrower who is not on title --

THE COURT: Right. Is the same as a guarantor.

MR. REILLY: -- hope I don't misspeak -- is the equivalent, the legal equivalent of a guarantor. I believe that's their argument.

THE COURT: Right. And you're saying no because they're primarily liable on the loan. But what I'm saying is, well even if I say under that circumstance it's okay.

The Division can still go after TitleMax if you're really treating them as guarantors, and you don't know the answer to that, and I don't know the answer to that, and factually we don't know. I mean are you treating -- if you're treating these people as guarantors, nothing I say about the statutory construction would impact their ability to go after TitleMax for how you're treating them.

You know, like I said, you can call a duck a du-que but it's a duck. I like that one, too, and I just made that up.

MR. REILLY: It's very clever. No, I understand your argument completely.

THE COURT: You know, and so that wouldn't factually, or that wouldn't preclude them from going, in my opinion, going after Titlemax administratively if you're calling --

MR. REILLY: They're doing that now.

THE COURT: Well no, but I mean if you're calling -- even if I say oh yeah you can have a co-borrower -- if I were to say that, who's principally liable. If you're really treating these co-borrowers as guarantors, then you're still in violation factually of the statute and they --

MR. REILLY: The regulation's just about --

THE COURT: -- and in my opinion they can --

MR. REILLY: -- accepting the guarantor. It doesn't say anything about collections or anything like that, so.

THE COURT: Yeah, but then we're down to well --

MR. REILLY: It's a legal question.

THE COURT: Well then we're -- also then that maybe is like a semantic issue, like I'm going to call, you know, I'm going to call you this but I'm going to treat you like that.

MR. REILLY: And that's why I said --

THE COURT: And so you could factually be in violation of the statute.

MR. REILLY: This is their regulation and, again, if we are down to semantics it's a pretty easy semantic issue to resolve.

I'd like to move on to the statute because the statute's actually far more important to my client than the regulation which we spent a great deal of time on.

THE COURT: Okay.

MR. REILLY: The statute prohibits licensee from charging additional fees or additional interest on the outstanding loan during a grace period. You articulated the legal question very well I thought.

We approach this from a statutory construction. *Maxim's* a statutory construction, and the main one that we've talked about is that words in a statute must not be rendered superfluous. And what the FID is essentially arguing is -- they're basically asking you to rewrite the statute to take the word additional out.

THE COURT: Because your opinion is if they just meant interest, they could have said interest.

MR. REILLY: Which is -- which is real --

THE COURT: You're not allowed to charge interest during the grace period.

MR. REILLY: Exactly, and what's interesting about that is that the initial draft of Section 23 of AB384 was written exactly that way. Additional was not part of that initial draft. It said, you know, may not charge any interest during the grace period, and that was subsequently changed to additional. And because we don't have any definition of additional in NRS Chapter 604A, we believe that the Court must interpret it to give meaning to all the words in the statute, and that includes additional.

I understand what you mentioned before about, well, these are statutes that are for the benefit of consumer protection. I actually disagree with you because AB384 was about balancing the interests of consumer protection with the industry. The industry was actually very much involved with the writing of AB384 and worked with Barbara Buckley who is the primary sponsor --

THE COURT: Consumer advocate.

MR. REILLY: Yes, primary consumer advocate, and the sponsor of the bill, and she worked with industry, industry worked with her, to achieve a balance, so it's a bit convenient to say well this is all about consumer protection. Not quite. It's about consumer protection and fairness to the industry at the same time. It was a balance.

But again I would say that letting the consumer protection tail --

THE COURT: Wag the dog.

MR. REILLY: -- wag the dog, it is inappropriate particularly where we have language like this in the statute and a prior version in AB384 that was subsequently changed, because it tells us that, no, you're allowed to continue to charge the interest that you originally agreed upon during the grace period. That makes sense, otherwise you're getting free money for a period of time and that's not fair to the licensee either.

So grace period, yes; can't charge fees for it, can't jack up the interest rate, absolutely not, but you can continue to charge the originally contracted amount of interest. And again, that's the only question that we're asking this Court to answer as to the statute.

If this Court has any other questions about that statute, we'd be glad to answer them.

THE COURT: I was just going to comment and this could be kind of a hybrid situation where the issue of the guarantor/co-borrower may require resolution of fact, but the question of is this additional interest or not additional interest may be amenable to a determination at this point.

MR. REILLY: And again, the reason we --

THE COURT: So --

MR. REILLY: -- the reason we brought this to you is so that we have some -- I don't want to say closure as to what the law means, but so we have an interpretation from a District Court judge so that we can act accordingly on a going-forward basis, not to say we wouldn't appeal an adverse ruling --

THE COURT: Right.

MR. REILLY: -- but my client's prepared to, you know, act accordingly in the interim period. We're not trying to gain the system, we're not, you know, trying to take advantage of the FID. We want to know what the law means.

And that's why we're here for -- in front of the Court today.

THE COURT: Okay.

MR. REILLY: Thank you very much.

THE COURT: The AG.

MR. POPE: Thank you, Your Honor.

This is not free money, and we believe that the legislature was, by using the word additional, was clarifying to have a harmonious statute -- statutory scheme, because if you -- the interest that is allowed is the interest that is allowed pursuant to 604A.445, subpart 3; 210 days of interest on an ever decreasing principal. And they initially charge additional interest by getting seven months of interest on the whole principle.

That's plain language of the statute. It's common, ordinary, you know, common sense -- ordinary meaning. There are definitions that we cited to in our briefing that a grace period is a period of time in which there's no penalty and no interest charged. So to use the legislative history, to have the meaning contrary to the plain meaning, to create an ambiguity, to make the argument, is contrary to, you know, equally impressive principles of statutory construction.

So we believe that the plain language controls the meaning of the statute here and that additional interest is anything beyond what's allowed by 604A.445(3).

Thank you.

THE COURT: All right. I'm going to consider this further.

On the first question on what a co-borrower is, I think -- I'm going to consider whether or not there's a question of fact on how are they treating these people? Are they really de facto guarantors by the way they treat them? Or can I issue a ruling a co-borrower under any circumstances is a guarantor, or a co-borrower may be a guarantor depending on treatment and that's what the statute means. So that one I may -- I mean there may be a question of fact in which case that'll be sent back to the Division.

I think clearly the meaning of additional interest is a question of law and basically boils down to what does additional mean? I think there's some ambiguity there because two reasonable interpretations of additional is additional meaning any interest beyond what you originally agreed to pay as part of your total payment of the loan, or does additional mean interest at a higher rate than what you bargained for?

So those are the two potential constructions there. I think that's a

question of statutory interpretation, so I'm taking it under advisement and to basically answer those three questions. The answer of the first question may, if the answer is it's a question of fact, then I'm not going to answer the second question. And then the third question will be answered one way or the other.

Okay, so look for something -- does that make sense? Look for something from chambers Monday.

So I've tried to articulate clearly what I think the questions I'm going to be answering are. And you don't have to come back; that'll be chambers, so look for a minute order.

Do you have a box for the AG's office? A folder?

MR. POPE: You know,Your Honor, I believe that --

THE COURT: You can just check Odyssey if you don't.

MR. POPE: I believe that we do but we recently haven't received something so I'm not sure how that's working.

THE COURT: Okay, well that's Kenny's job to put the minute orders in the folders. So, you know, if --

MR. POPE: From a different department.

THE COURT: -- if you don't have a folder just check Odyssey.

All right, great. I think that's it.

/ / / /

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MR. POPE: Thank you, Your Honor.

MR. REILLY: Thank you, Your Honor. Appreciate it.

****

PROCEEDING CONCLUDED AT 10:35 A.M.

**********

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Susan Schofield

SUSAN SCHOFIELD
Court Recorder/Transcriber

**DISTRICT COURT**
**CLARK COUNTY, NEVADA**

| Other Civil Matters | COURT MINUTES | December 14, 2015 |
|---|---|---|

A-15-719176-C Titlemax of Nevada Inc, Plaintiff(s)
vs.
Nevada Department of Business and Industry Financial Institutions, Defendant(s)

**December 14, 2015** **3:00 AM** **Decision**

**HEARD BY:** Adair, Valerie **COURTROOM:**

**COURT CLERK:** Denise Husted

**RECORDER:**

**REPORTER:**

**PARTIES PRESENT:**

**JOURNAL ENTRIES**

- COURT ORDERED, Plaintiff s Motion for Summary Judgment is DENIED; Defendants Motion to Dismiss is GRANTED. As to the first question of whether Plaintiff has violated NAC 604A.230(1)(a) anytime a co-borrower is not listed on the title, the COURT FINDS that there are questions of fact as to what the differences are between a co-borrower and a guarantor such that the Plaintiff must exhaust its administrative remedies and, later, seek judicial review by this Court. As to the second question of whether Plaintiff is in violation of NAC 604A.210 by charging interest during the grace period, the COURT FINDS that there is a question of fact as to the implementation of these grace periods and whether the total interest charged during the grace period plus the interest charged during the term of the loan (with extensions) exceeds the amount of allowable interest under NRS 604A.445.

CLERK'S NOTE: The Attorney General s office is directed to prepare the order.

Copies of this minute order placed in the attorney folders of:

Patrick J. Reilley, Esq. (HOLLAND & HART LLP)

Christopher Eccles (DEPUTY ATTORNEY GENERAL)

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jgwent@hollandhart.com

*Attorneys for Plaintiff*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| TITLEMAX OF NEVADA, INC., a Nevada corporation,<br><br>Plaintiff,<br><br>vs.<br><br>STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY FINANCIAL INSTITUTIONS DIVISION,<br><br>Defendant. | Case No.: A-15-719176-C<br><br>Dept. No.: XXI<br><br>**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES**<br><br>**AND**<br><br>**ORDER DENYING TITLEMAX'S MOTION FOR SUMMARY JUDGMENT** |

Defendant's Motion to Dismiss for Failure to Exhaust Administrative Remedies and TitleMax's Motion for Summary Judgment came on for hearing before this Court on December 9, 2015.

David J. Pope, Senior Deputy Attorney General appeared on behalf of the Defendant; Patrick J. Reilly, Esq., of Holland & Hart LLP, appeared on behalf of the Plaintiff.

The Court, having considered the papers and pleadings regarding the motion, as well as the oral argument presented by the parties, hereby orders as follows:

///

///

Defendant's Motion to Dismiss for Failure to Exhaust Administrative Remedies is hereby granted.

As to the first question of whether Plaintiff has violated NAC 604A.230(1)(a) anytime a co-borrower (as the term is used by Plaintiff) is not listed on the title of a vehicle, the Court finds that there are questions of fact as to what the differences are between a co-borrower and a guarantor.

As to the second question of whether Plaintiff is in violation of NRS 604A.210 by charging interest during a grace period, the Court finds that there is a question of fact as to the implementation of these grace periods and whether the total interest charged during the grace period plus the interest charged during the term of the loan (with extensions) exceeds the amount of allowable interest under NRS 604A.445.

Consequently, this case is dismissed and Plaintiff must exhaust its administrative remedies and, thereafter, seek judicial review by a district court pursuant to Chapter 233B of the NRS. Given the foregoing, TitleMax's Motion for Summary Judgment is hereby denied as moot.

IT IS SO ORDERED.

DATED this 2 day of January, 2016.

DISTRICT COURT JUDGE

Submitted by:

Patrick J. Reilly, Esq.
Joseph G. Went, Esq.
HOLLAND & HART LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134

*Attorneys for Plaintiff*

Holland & Hart LLP
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*Attorneys for Plaintiff*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| TITLEMAX OF NEVADA, INC., a Nevada corporation,<br><br>Plaintiff,<br><br>vs.<br><br>STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY FINANCIAL INSTITUTIONS DIVISION,<br><br>Defendant. | Case No.: A-15-719176-C<br><br>Dept. No.: XXI<br><br>**NOTICE OF ENTRY OF ORDER** |

PLEASE TAKE NOTICE that an Order Granting Defendant's Motion to Dismiss For Failure To Exhaust Administrative Remedies and Order Denying Titlemax's Motion For Summary Judgment was entered in the above-captioned matter on February 3, 2016. A copy of said Order is attached hereto.

DATED this 3rd day of February, 2016.

Patrick J. Reilly, Esq.
Joseph G. Went, Esq.
HOLLAND & HART LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134

*Attorneys for Plaintiff*







Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134

**CERTIFICATE OF SERVICE**

I hereby certify that on the 3rd day of February, 2016, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER** was served by the following method(s):

☒ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

Adam Paul Laxalt
Attorney General
David J. Pope
Sr. Deputy Attorney General
555 E. Washington Ave., Suite 3900
Las Vegas, NV 89101
Email: dpope@ag.nv.gov

*Attorneys for Defendant*

☒ U.S. Mail: by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

Denise S. McKay, Esq.
Administrative Law Judge
Nevada Division of Business & Industry
555 E. Washington Avenue, Suite 4900
Las Vegas, Nevada 89101
Tel: (702) 486-7041

☒ Email: by electronically delivering a copy via email to the following e-mail address:

Denise S. McKay, Esq.
Email: dsmckay@business.nv.gov

☐ Facsimile: by faxing a copy to the following numbers referenced below:

An Employee of Holland & Hart LLP



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jgwent@hollandhart.com

*Attorneys for Plaintiff*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| TITLEMAX OF NEVADA, INC., a Nevada corporation,<br><br>Plaintiff,<br><br>vs.<br><br>STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY FINANCIAL INSTITUTIONS DIVISION,<br><br>Defendant. | Case No.: A-15-719176-C<br><br>Dept. No.: XXI<br><br>**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES**<br><br>AND<br><br>**ORDER DENYING TITLEMAX'S MOTION FOR SUMMARY JUDGMENT** |

Defendant's Motion to Dismiss for Failure to Exhaust Administrative Remedies and TitleMax's Motion for Summary Judgment came on for hearing before this Court on December 9, 2015.

David J. Pope, Senior Deputy Attorney General appeared on behalf of the Defendant; Patrick J. Reilly, Esq., of Holland & Hart LLP, appeared on behalf of the Plaintiff.

The Court, having considered the papers and pleadings regarding the motion, as well as the oral argument presented by the parties, hereby orders as follows:

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///

Defendant's Motion to Dismiss for Failure to Exhaust Administrative Remedies is hereby granted.

As to the first question of whether Plaintiff has violated NAC 604A.230(1)(a) anytime a co-borrower (as the term is used by Plaintiff) is not listed on the title of a vehicle, the Court finds that there are questions of fact as to what the differences are between a co-borrower and a guarantor.

As to the second question of whether Plaintiff is in violation of NRS 604A.210 by charging interest during a grace period, the Court finds that there is a question of fact as to the implementation of these grace periods and whether the total interest charged during the grace period plus the interest charged during the term of the loan (with extensions) exceeds the amount of allowable interest under NRS 604A.445.

Consequently, this case is dismissed and Plaintiff must exhaust its administrative remedies and, thereafter, seek judicial review by a district court pursuant to Chapter 233B of the NRS. Given the foregoing, TitleMax's Motion for Summary Judgment is hereby denied as moot.

IT IS SO ORDERED.

DATED this 2 day of January, 2016.

DISTRICT COURT JUDGE

Submitted by:

Patrick J. Reilly, Esq.
Joseph G. Went, Esq.
HOLLAND & HART LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134

*Attorneys for Plaintiff*

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134

## Susann Thompson

**From:** Susann Thompson
**Sent:** Wednesday, February 03, 2016 2:11 PM
**To:** 'dsmckay@business.nv.gov'
**Cc:** Patrick Reilly
**Subject:** TitleMax of Nevada/State of Nevada - Notice of Entry of Order
**Attachments:** Notice of Entry of Order

Please see attached Notice of Entry of Order
Thank you.

**Susann Thompson**
*Legal Assistant for Patrick J. Reilly, Constance L. Akridge and David J. Freeman*
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*Attorneys for Plaintiff*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| TITLEMAX OF NEVADA, INC., a Nevada corporation,<br><br>Plaintiff,<br><br>vs.<br><br>STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY FINANCIAL INSTITUTIONS DIVISION,<br><br>Defendant. | Case No.: A-15-719176-C<br><br>Dept. No.: XXI<br><br>**NOTICE OF APPEAL** |

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134

///

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## NOTICE OF APPEAL

PLEASE TAKE NOTICE that Plaintiff TitleMax of Nevada, Inc. ("TitleMax") hereby appeals to the Supreme Court of the State of Nevada from the Order Re: Defendant's Motion to Dismiss for Failure to Exhaust Administrative Remedies and Order Denying TitleMax's Motion for Summary Judgment, the notice of entry of which is attached hereto as **Exhibit "1"**.

DATED this 12th day of February, 2016.

Patrick J. Reilly, Esq.
Joseph G. Went, Esq.
HOLLAND & HART LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134

*Attorneys for Plaintiff*

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134

## CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of February, 2016, a true and correct copy of the foregoing **NOTICE OF APPEAL** was served by the following method(s):

☒ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

Adam Paul Laxalt
Attorney General
David J. Pope
Sr. Deputy Attorney General
555 E. Washington Ave., Suite 3900
Las Vegas, NV 89101
Tel: (702) 486-3420
Fax: (702) 486-3416
Email: dpope@ag.nv.gov
*Attorneys for Defendant*

☒ U.S. Mail: by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

Denise S. McKay, Esq.
Administrative Law Judge
Nevada Division of Business & Industry
555 E. Washington Avenue, Suite 4900
Las Vegas, Nevada 89101
Tel: (702) 486-7041

☒ Email: by electronically delivering a copy via email to the following e-mail address:

Denise S. McKay, Esq.
Email: dsmckay@business.nv.gov

☐ Facsimile: by faxing a copy to the following numbers referenced below:

An Employee of Holland & Hart LLP

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134

# EXHIBIT 1

# EXHIBIT 1

NEOJ
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*Attorneys for Plaintiff*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| TITLEMAX OF NEVADA, INC., a Nevada corporation,<br><br>Plaintiff,<br><br>vs.<br><br>STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY FINANCIAL INSTITUTIONS DIVISION,<br><br>Defendant. | Case No.: A-15-719176-C<br><br>Dept. No.: XXI<br><br>**NOTICE OF ENTRY OF ORDER** |

PLEASE TAKE NOTICE that an Order Granting Defendant's Motion to Dismiss For Failure To Exhaust Administrative Remedies and Order Denying Titlemax's Motion For Summary Judgment was entered in the above-captioned matter on February 3, 2016. A copy of said Order is attached hereto.

DATED this 3rd day of February, 2016.

Patrick J. Reilly, Esq.
Joseph G. Went, Esq.
HOLLAND & HART LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134

*Attorneys for Plaintiff*

## CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of February, 2016, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER** was served by the following method(s):

☒ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

Adam Paul Laxalt
Attorney General
David J. Pope
Sr. Deputy Attorney General
555 E. Washington Ave., Suite 3900
Las Vegas, NV 89101
Email: dpope@ag.nv.gov

*Attorneys for Defendant*

☒ U.S. Mail: by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

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Electronically Filed
02/03/2016 10:17:51 AM

CLERK OF THE COURT

ORDR
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Email: preilly@hollandhart.com
jgwent@hollandhart.com

*Attorneys for Plaintiff*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| TITLEMAX OF NEVADA, INC., a Nevada corporation,<br><br>Plaintiff,<br><br>vs.<br><br>STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY FINANCIAL INSTITUTIONS DIVISION,<br><br>Defendant. | Case No.: A-15-719176-C<br><br>Dept. No.: XXI<br><br>**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES**<br><br>**AND**<br><br>**ORDER DENYING TITLEMAX'S MOTION FOR SUMMARY JUDGMENT** |

Defendant's Motion to Dismiss for Failure to Exhaust Administrative Remedies and TitleMax's Motion for Summary Judgment came on for hearing before this Court on December 9, 2015.

David J. Pope, Senior Deputy Attorney General appeared on behalf of the Defendant; Patrick J. Reilly, Esq., of Holland & Hart LLP, appeared on behalf of the Plaintiff.

The Court, having considered the papers and pleadings regarding the motion, as well as the oral argument presented by the parties, hereby orders as follows:

///

///

Defendant's Motion to Dismiss for Failure to Exhaust Administrative Remedies is hereby granted.

As to the first question of whether Plaintiff has violated NAC 604A.230(1)(a) anytime a co-borrower (as the term is used by Plaintiff) is not listed on the title of a vehicle, the Court finds that there are questions of fact as to what the differences are between a co-borrower and a guarantor.

As to the second question of whether Plaintiff is in violation of NRS 604A.210 by charging interest during a grace period, the Court finds that there is a question of fact as to the implementation of these grace periods and whether the total interest charged during the grace period plus the interest charged during the term of the loan (with extensions) exceeds the amount of allowable interest under NRS 604A.445.

Consequently, this case is dismissed and Plaintiff must exhaust its administrative remedies and, thereafter, seek judicial review by a district court pursuant to Chapter 233B of the NRS. Given the foregoing, TitleMax's Motion for Summary Judgment is hereby denied as moot.

IT IS SO ORDERED.

DATED this 6 day of January, 2016.

DISTRICT COURT JUDGE

Submitted by:

Patrick J. Reilly, Esq.
Joseph G. West, Esq.
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9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134

*Attorneys for Plaintiff*

Holland & Hart LLP
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## Susann Thompson

**From:** Susann Thompson
**Sent:** Wednesday, February 03, 2016 2:11 PM
**To:** 'dsmckay@business.nv.gov'
**Cc:** Patrick Reilly
**Subject:** TitleMax of Nevada/State of Nevada - Notice of Entry of Order
**Attachments:** Notice of Entry of Order

Please see attached Notice of Entry of Order
Thank you.

**Susann Thompson**
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HOLLAND&HART

## Yalonda J. Dekle

**From:** Yalonda J. Dekle
**Sent:** Friday, February 12, 2016 3:06 PM
**To:** 'dsmckay@business.nv.gov'
**Cc:** Patrick Reilly
**Subject:** TitleMax of Nevada/State of Nevada - Notice of Appeal and Case Appeal Statement
**Attachments:** Notice of Appeal.pdf; Case Appeal Statement.pdf

Please see attached.

**Yalonda J. Dekle**
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Email: preilly@hollandhart.com
jgwent@hollandhart.com

*Attorneys for Plaintiff*



**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| TITLEMAX OF NEVADA, INC., a Nevada corporation,<br><br>Plaintiff,<br><br>vs.<br><br>STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY FINANCIAL INSTITUTIONS DIVISION,<br><br>Defendant. | Case No.: A-15-719176-C<br><br>Dept. No.: XXI<br><br>**CASE APPEAL STATEMENT** |

1. Names of Appellant filing the Case Appeal Statement: TitleMax of Nevada, Inc.

2. Judge issuing the decision, judgment, and order appealed from: Eighth Judicial District Court Judge Valerie Adair.

3. Identify each appellant and the name and address of counsel for each appellant: TitleMax of Nevada, Inc., Appellant; and Patrick J. Reilly, Esq. and Joseph G. Went, Esq., Holland & Hart LLP, 9555 Hillwood Drive, Second Floor, Las Vegas, Nevada 89134.

4. Identify each respondent and the name and address of counsel for each respondent: State of Nevada, Department of Business and Industry Financial Institutions Division, Respondent; and Adam Paul Laxalt, Attorney General, David J. Pope, Senior Deputy Attorney General, 555 E. Washington Ave., Suite 3900, Las Vegas, NV 89101.

5. All attorneys identified above are licensed to practice law in Nevada.

6. The Appellant was represented by retained counsel in the district court.

7. The Appellant is represented by retained counsel on appeal.

8. The Appellant was not granted leave to proceed *in forma pauperis*.

9. The proceedings in the district court were commenced on June 1, 2015.

10. A brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:

This is an appeal of an Order Granting State of Nevada, Department of Business and Industry Financial Institutions Division's ("FID") Motion to Dismiss for Failure to Exhaust Administrative Remedies and Order Denying TitleMax of Nevada, Inc.'s ("TitleMax") Motion for Summary Judgment. The FID is an agency of the State of Nevada with regulatory authority over loans made pursuant to NRS Chapter 604A. TitleMax is a lender licensed pursuant to NRS Chapter 604A and is a "licensee" within the meaning of NRS 604A.075. TitleMax offers automobile title loans to its borrowers, which are governed by NRS Chapter 604A and are regulated by the FID and its Commissioner. The declaratory relief action involves a dispute over the interpretation of NRS 604A.210, NRS 604A.445, and NAC 604A.230.

On October 6, 2015, FID filed a Motion to Dismiss TitleMax's Complaint for Failure to Exhaust Administrative Remedies. Subsequently on October 14, 2016, TitleMax filed a Motion for Summary Judgment. On December 9, 2015, both motions came on for hearing. Although TitleMax was purely seeking an interpretation as to NRS 604A.210, NRS 604A.445, and NAC 604A.230, the lower court concluded that as to the first question of whether TitleMax had violated NAC 604A.230(1)(a) anytime a co-borrower is not listed on the title of a vehicle, that there are questions of fact as to what the differences are between co-borrower and a guarantor. The Court further held that as to the second question of whether NRS 604A.210 prohibits the charging of any interest during a grace period, that there was a question of fact as to the implementation of these grace periods and whether the total interest changed during the grace period plus the interest charged during the time of the loan (with extensions) exceeded the

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9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134

amount of allowable interest under NRS 604A.445. The Court therefore dismissed TitleMax's action and denied its Motion for Summary Judgment as moot.

11. This case has not previously been the subject of an appeal to or original writ proceeding in the Supreme Court.

12. This appeal does not involve child custody or visitation.

13. This appeal does not involve the possibility of settlement.

DATED this 12th day of February, 2016.

Patrick J. Reilly, Esq.
Joseph G. Went, Esq.
HOLLAND & HART LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134

*Attorneys for Plaintiff*

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134

**CERTIFICATE OF SERVICE**

I hereby certify that on the 12th day of February, 2016, a true and correct copy of the foregoing **CASE APPEAL STATEMENT** was served by the following method(s):

☒ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

Adam Paul Laxalt
Attorney General
David J. Pope
Sr. Deputy Attorney General
555 E. Washington Ave., Suite 3900
Las Vegas, NV 89101
Tel: (702) 486-3420
Fax: (702) 486-3416
Email: dpope@ag.nv.gov
*Attorneys for Defendant*

☒ U.S. Mail: by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

Denise S. McKay, Esq.
Administrative Law Judge
Nevada Division of Business & Industry
555 E. Washington Avenue, Suite 4900
Las Vegas, Nevada 89101
Tel: (702) 486-7041

☒ Email: by electronically delivering a copy via email to the following e-mail address:

Denise S. McKay, Esq.
Email: dsmckay@business.nv.gov

☐ Facsimile: by faxing a copy to the following numbers referenced below:

An Employee of Holland & Hart LLP

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134

## Yalonda J. Dekle

**From:** Yalonda J. Dekle
**Sent:** Friday, February 12, 2016 3:06 PM
**To:** 'dsmckay@business.nv.gov'
**Cc:** Patrick Reilly
**Subject:** TitleMax of Nevada/State of Nevada - Notice of Appeal and Case Appeal Statement
**Attachments:** Notice of Appeal.pdf; Case Appeal Statement.pdf

Please see attached.

**Yalonda J. Dekle**
*Legal Assistant to Ryan Loosvelt, Nicole Lovelock and Andrea M. Champion*
Holland & Hart LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600
Fax: (702) 669-4650
YJDekle@hollandhart.com

**EIGHTH JUDICIAL DISTRICT COURT CLERK'S OFFICE**

# NOTICE OF DEFICIENCY

**ON APPEAL TO NEVADA SUPREME COURT**

**PATRICK J. REILLY, ESQ.**
**9555 HILLWOOD DR., SECOND FLOOR**
**LAS VEGAS, NV 89134**

**DATE: February 17, 2016**
**CASE: A719176**

**RE CASE:** TITLEMAX OF NEVADA, INC. vs. STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY FINANCIAL INSTITUTIONS DIVISION

NOTICE OF APPEAL FILED: February 12, 2016

**YOUR APPEAL HAS BEEN SENT TO THE SUPREME COURT.**

PLEASE NOTE: DOCUMENTS **NOT** TRANSMITTED HAVE BEEN MARKED:

☒ $250 – Supreme Court Filing Fee (Make Check Payable to the Supreme Court)**
- If the $250 Supreme Court Filing Fee was not submitted along with the original Notice of Appeal, it must be mailed directly to the Supreme Court. The Supreme Court Filing Fee will not be forwarded by this office if submitted after the Notice of Appeal has been filed.

☐ $24 – District Court Filing Fee (Make Check Payable to the District Court)**

☒ $500 – Cost Bond on Appeal (Make Check Payable to the District Court)**
- NRAP 7: Bond For Costs On Appeal in Civil Cases

☐ Case Appeal Statement
- NRAP 3 (a)(1), Form 2

☐ Order

☐ Notice of Entry of Order

NEVADA RULES OF APPELLATE PROCEDURE 3 (a) (3) states:

"The district court clerk must file appellant's notice of appeal despite perceived deficiencies in the notice, including the failure to pay the district court or Supreme Court filing fee. **The district court clerk shall apprise appellant of the deficiencies in writing**, and shall transmit the notice of appeal to the Supreme Court in accordance with subdivision (e) of this Rule with a notation to the clerk of the Supreme Court setting forth the deficiencies. Despite any deficiencies in the notice of appeal, the clerk of the Supreme Court shall docket the appeal in accordance with Rule 12."

*Please refer to Rule 3 for an explanation of any possible deficiencies.*

***Per District Court Administrative Order 2012-01, in regards to civil litigants, "...all Orders to Appear in Forma Pauperis expire one year from the date of issuance." You must reapply for in Forma Pauperis status.*

**NPNR**
Patrick J. Reilly, Esq.
Nevada Bar No. 6103
Joseph G. Went, Esq.
Nevada Bar No. 9220
HOLLAND & HART LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
Tel: (702) 669-4600
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Email: preilly@hollandhart.com
jgwent@hollandhart.com

*Attorneys for Plaintiff*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| TITLEMAX OF NEVADA, INC., a Nevada corporation,<br><br>Plaintiff,<br><br>vs.<br><br>STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY FINANCIAL INSTITUTIONS DIVISION,<br><br>Defendant. | Case No.: A-15-719176-C<br><br>Dept. No.: XXI<br><br>**NOTICE OF POSTING COST BOND ON APPEAL** |

Please take notice that the Cost Bond on Appeal has been posted and submitted to the Clerk of Court in the amount of $500.00 on February 19, 2016. A copy of the receipt is attached hereto.

DATED this 22nd day of February, 2016.

Patrick J. Reilly, Esq.
Joseph G. Went, Esq.
HOLLAND & HART LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134

*Attorneys for Plaintiff*



8504185_1

**CERTIFICATE OF SERVICE**

I hereby certify that on the 22nd day of February, 2016, a true and correct copy of the foregoing **NOTICE OF POSTING COST BOND ON APPEAL** was served by the following method(s):

☒ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

Adam Paul Laxalt
Attorney General
David J. Pope
Sr. Deputy Attorney General
555 E. Washington Ave., Suite 3900
Las Vegas, NV 89101
Email: dpope@ag.nv.gov
*Attorneys for Defendant*

☒ U.S. Mail: by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

Denise S. McKay, Esq.
Administrative Law Judge
Nevada Division of Business & Industry
555 E. Washington Avenue, Suite 4900
Las Vegas, Nevada 89101
Tel: (702) 486-7041

☒ Email: by electronically delivering a copy via email to the following e-mail address:

Denise S. McKay, Esq.
Email: dsmckay@business.nv.gov

☐ Facsimile: by faxing a copy to the following numbers referenced below:

Susann Thompson
An Employee of Holland & Hart LLP

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134

# OFFICIAL RECEIPT

## District Court Clerk of the Court 200 Lewis Ave, 3rd Floor Las Vegas, NV 89101

Payor
Holland & Hart LLP

Receipt No.
**2016-16967-CCCLK**

Transaction Date
02/19/2016

| Description | Amount Paid |
|---|---|

On Behalf Of Titlemax of Nevada Inc
A-15-719176-C
Titlemax of Nevada Inc, Plaintiff(s) vs. Nevada Department of Business and Industry Financial Institutions, Defendant(s)
Appeal Bond

| | |
|---|---|
| Appeal Bond | 500.00 |
| **SUBTOTAL** | **500.00** |

**PAYMENT TOTAL** **500.00**

| | |
|---|---|
| Check (Ref #66007484) Tendered | 500.00 |
| Total Tendered | **500.00** |
| Change | 0.00 |

02/19/2016 11:21 AM | Cashier Station AIKO | Audit 35392675

OFFICIAL RECEIPT

**REQT**
Patrick J. Reilly, Esq.
Nevada Bar No. 6103
Joseph G. Went, Esq.
Nevada Bar No. 9220
HOLLAND & HART LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
Tel: (702) 669-4600
Fax: (702) 669-4650
Email: preilly@hollandhart.com
jgwent@hollandhart.com

*Attorneys for Plaintiff*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| TITLEMAX OF NEVADA, INC., a Nevada corporation,<br><br>Plaintiff,<br><br>vs.<br><br>STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY FINANCIAL INSTITUTIONS DIVISION,<br><br>Defendant. | Case No.: A-15-719176-C<br><br>Dept. No.: XXI<br><br>**REQUEST FOR TRANSCRIPTS** |

TO: SUSIE SCHOFIELD, Court Reporter.

Plaintiff, TitleMax of Nevada, Inc., hereby requests preparation of transcripts of the proceedings before the district court, as follows:

**Judge or officer hearing the proceeding**: Judge Valerie Adair

**Date of proceeding**: December 9, 2015 (motions hearing)

**Number of copies required**: Two

**Portions of Transcript requested**: All

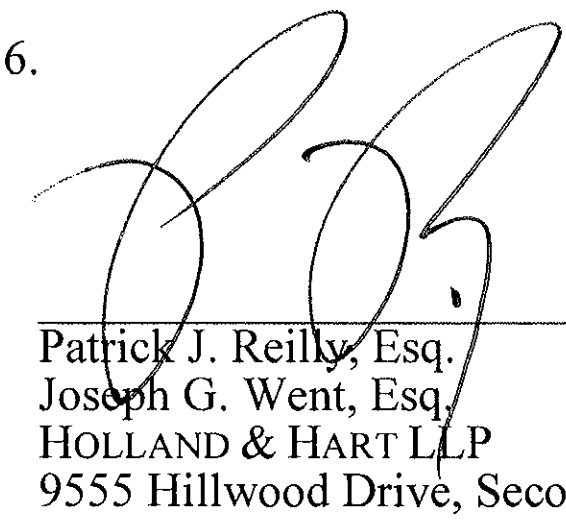
**Court Reporter**: Susie Schofield

/ / /

/ / /

I hereby certify that on this date I ordered these transcripts from the court reporter named above and that arrangements have been made to pay the court reporter for the transcripts as referenced above.

DATED this 6th day of April 2016.



Patrick J. Reilly, Esq.
Joseph G. Went, Esq.
HOLLAND & HART LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134

*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 6th day of April, 2016, a true and correct copy of the foregoing **REQUEST FOR TRANSCRIPTS** was served by the following method(s):

☒ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

Adam Paul Laxalt
Attorney General
David J. Pope
Sr. Deputy Attorney General
555 E. Washington Ave., Suite 3900
Las Vegas, NV 89101
Email: dpope@ag.nv.gov
*Attorneys for Defendant*

☒ U.S. Mail: by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

Denise S. McKay, Esq.
Administrative Law Judge
Nevada Division of Business & Industry
555 E. Washington Avenue, Suite 4900
Las Vegas, Nevada 89101

Susie Schofield
Eighth Judicial District Court
Dept. 21
200 Lewis Avenue
Las Vegas, Nevada 89147
*Court Reporter*

☒ Email: by electronically delivering a copy via email to the following e-mail address:

Susie Schofield
Eighth Judicial District Court
Dept. 21
200 Lewis Avenue
Las Vegas, Nevada 89147
Email: schofields@clarkcountycourts.us
*Court Reporter*

Susann Thompson
An Employee of Holland & Hart LLP

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134

## Susann Thompson

**From:** Susann Thompson
**Sent:** Wednesday, April 06, 2016 11:20 AM
**To:** 'Schofield, Susan'
**Subject:** Titlemax of Nevada/State of Nevada (Case No. A719176 - Request for Transcripts
**Attachments:** Transcript Order Form.pdf; Request for Transcripts.pdf

Please see attached Request for Transcripts and your completed transcript order form. I will be filing the Request for Transcripts document with Wiznet momentarily. Please acknowledge receipt of this email. If you have any questions, please do not hesitate to contact me.

Thank you.

**Susann Thompson**
*Legal Assistant for Patrick J. Reilly, Constance L. Akridge,*
*David J. Freeman and Susan M. Schwartz*
Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, NV 89134
Phone (702) 222-2527
Fax (702) 669-4650
E-mail: sthompson@hollandhart.com

HOLLAND&HART
LAW OUTWEST



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**From:** Schofield, Susan [mailto:SchofieldS@clarkcountycourts.us]
**Sent:** Tuesday, April 05, 2016 3:57 PM
**To:** Susann Thompson
**Subject:** Case No. A719176; Titlemax vs. Nev. Dept. of Business...

Attached is a transcript order form. Please call if you have any questions.

Susie Schofield
Court Recorder to
The Honorable Valerie Adair
Department 21, Eighth Judicial District Court
(702) 671-4445
schofields@clarkcountycourts.us

NOTC
ADAM PAUL LAXALT
Attorney General
David J. Pope, #8617
Senior Deputy Attorney General
555 E. Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
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Fax: (702) 486-3416
dpope@ag.nv.gov
*Attorneys for Defendants*

DISTRICT COURT

CLARK COUNTY, NEVADA

| | |
|---|---|
| TITLEMAX OF NEVADA, INC., a Nevada Corporation,<br><br>Plaintiffs,<br><br>vs.<br><br>STATE OF NEVADA, ex rel. it's DEPARTMENT OF BUSINESS AND INDUSTRY, FINANCIAL INSTITUTIONS DIVISION,<br><br>Defendant. | Case No. A-15-719176-C<br>Dept. No. XXI |

*Attorney General's Office*
100 N. Carson Street
Carson City, Nevada 89701-4717

**NOTICE REGARDING REPRESENTATION OF DEFENDANT**

NOTICE IS HEREBY GIVEN that Senior Deputy Attorney General David J. Pope is retaining responsibility for representing the Defendant in the above-entitled action, and that Christopher A. Eccles, Esq. is no longer representing Defendant.

DATED this 15th day of April 2016.

ADAM PAUL LAXALT
Attorney General

By: _____
David J. Pope,
Senior Deputy Attorney General
555 E. Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
Ph. (702) 486-3426
dpope@ag.nv.gov
*Attorneys for Defendant*

Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing NOTICE OF WITHDRAWAL OF ATTORNEY with the Clerk of the Court by using the electronic filing system on the 15th day of April, 2016.

The following participants in this case are registered electronic filing systems users and will be served electronically:

Patrick J. Reilly, Esq.
Holland & Hart
9555 Hillwood Dr., 2nd Floor
Las Vegas, NV 89134
preilly@hollandhart.com

( )

I certify that some of the participants in the case are not registered electronic filing system users and I have mailed the foregoing documents by First-Class Mail, postage prepaid to:

( )

I certify that I have served the foregoing documents by First-Class Mail, postage prepaid and by e-mailing same to participant's personal e-mail address as follows:

/s/ Debra Turman
An employee of the Office of the Attorney General